No. 92-1550

IN THE

Supreme Court of the United States

October Term, 1992

ABF FREIGHT SYSTEM, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN V. JANSONIUS
Counsel of Record
JILL J. WEINBERG
HAYNES AND BOONE, L.L.P.
3100 NationsBank Plaza
901 Main Street
Dallas, Texas 75202-3789
Telephone: (214) 651-5000
Telecopy: (214) 651-5940

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(2916—LC9-390—1993)

QUESTIONS PRESENTED

1. Does section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), prohibit the NLRB from ordering reinstatement of an employee who was discharged for just cause under the applicable collective bargaining agreement?

2. Can the NLRB set aside findings of fact made in final and binding grievance arbitration under a collective bargaining agreement?

3. Does an employee forfeit the remedy of reinstatement with backpay after the Administrative Law Judge finds that he purposefully testified falsely during the administrative hearing?

PARTIES TO THE PROCEEDING

(Rule 28.1 Statement)

ABF Freight System, Inc. is a wholly owned subsidiary of Arkansas Best Corporation. ABF Freight System, Inc. has one subsidiary by the name of ABF Freight System (BC), Ltd. Respondent is the National Labor Relations Board, an agency of the United States government. Michael Manso is an individual who ABF Freight System, Inc. has been ordered to reinstate to employment in Albuquerque, New Mexico.

Table of Contents.

Index to Appendices.

TABLE OF AUTHORITIES.

CITATIONS:

Page

—— No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

ABF FREIGHT SYSTEM, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CITATION OF OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Circuit has been reported at 982 F.2d 441 (10th Cir. 1993) and is included in the Appendix for Petitioner submitted herein, beginning at page A-1. The Decision and Order of the

National Labor Relations Board and the Administrative Law Judge's Decision have been reported at 304 NLRB No. 75 (1991) and are included in the Appendix beginning on page B-1.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1992 (Appendix A-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals for the Tenth Circuit had jurisdiction over the National Labor Relations Board's Final Order pursuant to 29 U.S.C. § 160(f) (1988).

STATUTORY PROVISIONS INVOLVED

Section 10(c) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(c) 1988 provides:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

NLRA § 203(d), 29 U.S.C. § 173(d) (1988) speaks to the preferred means for determining cause for discharge and other issues of labor contract interpretation. That statutory provision states:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement or interpretation of an existing collective bargaining agreement.

The text of all statutory provisions referred to in this Petition are included in the Appendix beginning on page C-1.

STATEMENT OF THE CASE

The Tenth Circuit Court of Appeals' decision involves important federal questions over which there is a clear split in published decisions by the federal circuit courts of appeals. The first question goes to the meaning of the clause in NLRA § 10(c), 29 U.S.C. § 160(c) (1988) prohibiting the National Labor Relations Board (the "Board") from awarding reinstatement and backpay to an employee who was discharged for cause. Specifically, can the Board order reinstatement and backpay to an employee even though it has been determined in final and binding grievance arbitration that the employee was discharged for cause in accordance with the applicable collective bargaining agreement? A corallary question directly raised by the Tenth Circuit's ruling is whether the Board can set aside findings of fact made in final and binding grievance arbitration under a labor contract.

The second issue goes to the integrity of the NLRA and its adjudicatory system. Can an employee who lies to his employer and then repeats his lie to an administrative law judge, during a formal NLRB proceeding, be reinstated to his job and awarded backpay? Within the last 10 months, the

Eight Circuit has said "no" and the Tenth Circuit has said "yes." In this case, the Tenth Circuit has condoned perjured testimony in an NLRB hearing by rewarding the perjuror with reinstatement and back pay.

The facts pertinent to this Petition For a Writ of Certiorari are not in dispute. ABF Freight System, Inc. ("ABF") is an interstate trucking company with freight terminals in several cities, including Albuquerque, New Mexico. Dock workers at the Albuquerque terminal are represented by Local 492 of the International Brotherhood of Teamsters, Warehousemen & Helpers of America ("Local 492"). Wages, hours, terms and conditions of employment for ABF's dock workers in Albuquerque are set out in national and regional labor contracts respectively known as the National Master Freight Agreement ("NMFA") and Western States Area Supplemental Agreement ("WSA").

Michael Manso was hired as a casual dock worker at the Albuquerque terminal in April 1987. As an ABF employee, Mr. Manso was represented by Local 492 and was covered by the NMFA and WSA. Article 46, section 1 of the WSA provides that covered employees can only be terminated with "just cause." One warning notice for an offense is required before termination may be imposed, except for certain serious offenses, such as dishonesty, which can result in immediate discharge.

The specific events material to this Petition began in the Spring of 1989. On June 19 that year, Mr. Manso was discharged from employment after two incidents of failure to protect start time. For a casual like Mr. Manso, failure to protect start time means he was unavailable for work at a time when he was subject to being called by ABF.

Mr. Manso grieved his June 19 termination and explained at the hearing, for the first time, that his telephone was not working. The Arizona-New Mexico Joint State Committee commuted Mr. Manso's discharge to a suspension without pay. Mr. Manso was reinstated to the casual list within a week after his June discharge.

Not long after completing his suspension, Manso was late for work on two occasions. The first incident was on August 11, 1989 and he was given a warning letter for tardiness. The second incident was on August 17, 1989 and this time he was discharged.

As an excuse for his tardiness on August 17, 1989, Mr. Manso told his supervisor that his car broke down on the freeway. He volunteered that he was assisted by Officer Smith of the Bernalillo County Sheriff's Department. When pressed for specifics, however, Mr. Manso became evasive and said he did not want to explain why he was late. At the suggestion of Local 492 Shop Steward Walter Maesta, Albuquerque Branch Manager Mike Long, and Operations Manager Ed Fultz checked out Mr. Manso's story with the Bernalillo County Sheriff's Department. After doing that, they concluded that Mr. Manso's explanation was not legitimate and that his tardiness was not excused. Mr. Manso was discharged on August 21, 1989.

Through Local 492, Mr. Manso again lodged a grievance and again a hearing was held before the Arizona-New Mexico Joint State Committee ("JSC"). The JSC is comprised of an equal number of representatives of labor and management - none of whom can be affiliated with the company or local union involved in the dispute. This time the JSC concluded that just cause existed for the termination of Mr.

Manso and denied his grievance. Under WSA Article 45, § 1(a), the JSC's decision was final and binding.

After losing his grievance, Mr. Manso filed an unfair labor practice charge with Region 28 of the National Labor Relations Board. He alleged that he was discharged in violation of NLRA §§ 8(a)(3) and (4), 29 U.S.C. § 158(a)(3) and (4) (1988) because he previously had filed an unfair labor practice charge and provided testimony to Region 28 of the Board. The unfair labor practice charge challenging Mr. Manso's August 1989 discharge was the subject of a hearing before Administrative Law Judge Walter J. Maloney the week of January 8, 1990.

At the hearing, Mr. Manso testified under oath. He repeated the story about his car breaking down while on his way to work on August 17, 1989. He also repeated the story about being assisted with his stranded automobile by Officer Smith of the Bernalillo County Sheriff's Department. To Mr. Manso's and Counsel for the General Counsel's visible surprise, however, Officer Smith appeared and testified at the hearing. In flat refutation of Mr. Manso, Officer Smith testified that he stopped Mr. Manso for speeding the morning of August 17 at a time long after Manso should already have been at work. Manso's car was just fine and Officer Smith was not there to help a stranded motorist.

Given Officer Smith's testimony, the Administrative Law Judge recognized the implausibility and direct contradiction of Mr. Manso's testimony. Judge Maloney specifically found that "Manso was lying." (Appendix, Page B-59). The finding that Manso purposefully testified untruthfully was not rejected or even questioned by the Board or Tenth Circuit.

REASONS FOR GRANTING WRIT

A. Introduction.

This case involves issues of substantial public importance over which the Court of Appeals for the Tenth Circuit is in conflict with the Courts of Appeals for the Fifth, Seventh, Eighth, and Ninth Circuits. Further, in opposition to this Court's repeated pronouncements concerning the important federal policy favoring private resolution of labor disputes, the Tenth Circuit's decision significantly compromises the rights of labor and management to collectively bargain and maintain contractual relationships. If the decision of the Court of Appeals below is allowed to stand, the exclusivity and finality of private labor dispute resolution processes will be substantially compromised and the integrity and value of the oath taken by witnesses in administrative hearings will be weakened.

B. There Is A Square Conflict between The Tenth And Fifth Circuits Over The Binding Effect Of Arbitrator Findings Of Fact.

In its decision in this case, the Tenth Circuit concluded that the Board was not bound to honor the Joint State Committee's determination that Mr. Manso was discharged for cause. That holding is in conflict with federal labor policy favoring private resolution of labor disputes and with the Fifth Circuit's holding in *Owens v. Texaco, Inc.*, 857 F.2d 262 (5th Cir.), *cert. denied*, 490 U.S. 1046 (1990). In *Owens*, the Fifth Circuit held:

> [U]nder the *Steelworkers' Trilogy*, the arbitral decision is final and binding to the extent it resolves

> questions of contractual rights. The employee may assert his independent statutory rights . . . but the arbitrator's interpretation of the contract status of the parties is controlling.

Id. at 265 (citations omitted).

Here, the Joint State Committee determined that ABF had just cause to terminate Manso in August 1989. That finding might not be dispositive on the unfair labor practice question under sections 8(a)(3) and (4) of the Act, but it most certainly is dispositive of the contractual relationship between ABF and Manso. *See generally Gilmer v. Interstate Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647, 1656-1657 (1991); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 66 (1975). Thus, under section 10(c) of the Act, 29 U.S.C. § 160(c), the Board's authority in NLRB case 28-CA-9916 was limited to declaratory and injunctive relief. The NLRA does not empower the Board to bind employers to a contractual relationship found through final and binding arbitration to have been properly terminated.

—

The federal labor policy favoring private dispute resolution applicable to Manso's termination and to the issue in *Owens* is the exclusivity of arbitral rulings on contractual rights. *See Gateway v. United Mine Workers*, 414 U.S. 368, 94 S. Ct. 629 (1974). This federal policy is firmly grounded in Congress' command in Section 203(d) of the Act that: "the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement" should be the method of disputes resolution agreed by the parties. 29 U.S.C. § 173(d) (1988). When an arbitrator or grievance panel

with proper authority applies a labor contract, its decision is exclusive, it is final, and it is binding. Absent unfair representation or other significant irregularity in the proceedings, the arbitrator's decision about contractual rights cannot be interfered with. *See Owens*, 857 F.2d at 265.

By condoning the fiction that there is a difference between contractual just cause and statutory just cause, the Tenth Circuit has undermined this Court's repeated pronouncements beginning with *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). To wit: final resolution of disputes arising under collective bargaining agreements through private arbitration is favored. Allowing the Board to override decisions made in arbitration and to re-establish an employees status under the labor contract is at odds with federal labor policy.

Recognizing the finality of arbitral findings of fact does not interfere with the NLRB's role in deciding unfair labor practice charges. The Board can hear unfair labor practice cases, decide whether the Act has been violated, and enter declaratory, injunctive, and other equitable relief when warranted. To force a business to rehire an individual after an arbitral body chosen by labor and management has ruled that the employee has no right to employment under the labor contract, however, is to frustrate the right recognized by federal labor policy for private resolution of labor disputes. When sections 8(a), 10(c), and 203(d) of the Act are placed side by side, the conclusion is clear: the Board's remedial power, when there are separate findings of just cause for discharge and commission of an unfair labor practice, is limited to injunctive and declaratory relief—it cannot order backpay and reinstatement.

C. The Tenth Circuit's Decision Is In Derivation Of NLRA § 10(c) And Federal Policy Favoring Collective Bargaining And Private Resolution Of Disputes Involving Application Of Collective Bargaining Agreements.

Section 10(c) expressly prohibits reinstatement and backpay to an employee where there was just cause for the employee's termination.[1] In this case, the Joint State Committee and the Administrative Law Judge concluded that Petitioner had just cause to discharge Mr. Manso. Nevertheless, the Tenth Circuit allowed the Board to substitute its opinion for that of the grievance committee on the existence of just cause. (Appendix A-1). Allowing the Board to substitute its judgment for that of the arbitrator on the issue of just cause is contrary to the statute, is contrary to the federal policy favoring private resolution of labor disputes, and interferes with the finality of grievance procedures that is a cornerstone to effectiveness of private dispute resolution procedures. In effect, the parties' agreement to arbitrate terminations would be eviscerated if the NLRB is allowed veto power over just cause determinations. The Act enables the Board to prohibit unfair labor practices without interferring with contractual relationships and that is the obvious purpose of section 10(c). In this case, the Tenth Circuit has authorized the Board to go further than the Act contemplates and to impose its view of contractual rights on labor and management.

Consistent with the clear implication of section 10(c), the purposes of the Act are not served by awarding reinstatement with backpay to an employee who engaged in conduct warranting discharge, even when the discharge violated sec-

[1]In pertinent part Section 10(c) provides: "no order of the Board *shall* require the reinstatement of any . . . employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged *for cause*." 29 U.S.C. § 160(c)(emphasis added).

tions 8(a)(3) or (4). As discussed below, circuit courts in several cases have recognized that reinstatement is not appropriate just because the former employee was the subject of a discriminatory employment practice.

1. *Cases Applying Section 10(c).*

Although the Board has authority to order reinstatement and backpay to effectuate purposes of the NLRA, reinstatement is not always proper even if the former employee was the subject of discrimination. The express language of section 10(c) makes clear that policies of the Act are not served by awarding reinstatement and backpay to an employee affected by conduct prohibited by sections 8(a)(3) and (4) where there was just cause for that employee's discharge. *NLRB v. Big Three Indus. Gas & Equip. Co.*, 405 F.2d 1140, 1143 (5th Cir. 1969); *NLRB v. Apico Inns*, 512 F.2d 1171, 1175. (9th Cir. 1975). In *Apico Inns*, the Ninth Circuit denied enforcement of an NLRB reinstatement order for an employee fired in retaliation for use of union grievance procedures because the employee had been uncooperative and disruptive. Given the employee's behavior, the circuit court explained that reinstatement would bid "ill for all concerned." 512 F.2d at 1175. *See also Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095, 1097 (8th Cir. 1981); *Pacific Tel. & Tel. Co. v. NLRB*, 711 F.2d 134 (9th Cir. 1983) (since employees were discharged for cause, reinstatement and backpay improper under section 10(c) even though employer violated employees' *Weingarten* rights); *General Teamsters Local No. 162 v. NLRB*, 782 F.2d 839 (9th Cir. 1986) (strikers who were discharged in violation of sections 8(a)(1) and 8(a)(3) denied reinstatement and backpay because they were guilty of strike misconduct).

In all the cases cited above, reinstatement with backpay was found not to serve policies of the NLRA because that remedy would reward an employee for improper conduct. Here, Manso was deceitful about the reason for his tardiness and ABF was highly skeptical of his explanation. The Joint State Committee concurred that ABF had just cause to discharge Manso. ABF's suspicion was proved justified when it became clear, through the testimony of Bernalillo County Sheriff's Deputy Smith, that Manso had lied. Just cause existed for Manso's termination and the policies of the NLRA will not be served by reinstatement with backpay. More pointedly, section 10(c) prohibits reinstatement under these circumstances.

2. *Applicable Rules of Statutory Construction.*

A long standing rule of statutory construction is that courts will not interpret a statute in a manner that makes a particular provision unnecessary or insignificant. Rather, "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Knutzen v. Eben Ezer Lutheran Housing Center,* 815 F.2d 1343, 1349 (10th Cir. 1987), *citing,* 2 A. N. Singer, *Sutherland Statutory Construction* (4th ed. 1984), § 46.06. *See also Mackey v. Lanier Collections Agency,* 486 U.S. 825, 837 (1988). Under the Tenth Circuit's decision, however, section 10(c) is no more than an insignificant and unnecessary reiteration of sections 8(a)(3) and (4).

One, the NLRB undeniably has responsibility under sections 8(a)(3) and (4) for determining whether a contested termination from employment was discriminatory. On the other hand, if backpay and reinstatement are authorized anytime the Board finds that a discharge was discriminatory, there would be no need for the just cause provision in section 10(c). A positive finding on the issue of discrimination under section 8(a) would conclusively dispose of the just cause issue under section 10(c). Thus, Counsel for the Board's rationale would eliminate all significance to the just cause proviso. Section 10(c) would be superfluous.

Two, unlike the issue of discrimination under sections 8(a)(3) and (4), the Act does not expressly assign to the Board responsibility for making findings on the just cause issue. Section 10(a) expressly empowers the Board and only the Board to prevent unfair labor practices under sections 8(a) and (b) of the Act. In contrast, Section 10(a) does not expressly empower the Board to determine the issue of just cause. As this Court and every other court in the land has said at one time or another, the expression of one thing implies exclusion of another ("*expressio unius est exclusion alterius*"). *See Rawson v. Sears, Roebuck & Co.,* 822 F.2d 908, 921 (10th Cir. 1987). *See also Touche Ross & Co. v. Redington,* 442 U.S. 560, 568, 99 S.Ct. 2479, 2485-87 (1979) (no implied private right of action under one section of statute where another section of statute expressly allowed for private action). By expressly assigning to the Board exclusive power to decide whether unfair labor practices were committed under section 8(a) without expressing a similar power on the issue of just cause under section 10(c), Congress created an inference that the Board is not the exclusive authority for just cause determination.

The rationale of the *expressio unius* maxim is bolstered in this case by two additional points. *Except* for the just cause proviso, every sentence in section 10(c) refers to findings by the Board or to affirmative powers of the Board. The sentence in section 10(c) regarding just cause does not mention

the phrase in connection with findings by the Board, and this sentence is a limitation on Board power—not an expression of it.

Additionally, the term just cause is not defined in the Act. In contrast, the term "unfair labor practices" is defined and the conduct prohibited is spelled out. NLRA §§ 2 and 8(a)(1)-(5), 29 U.S.C. §§ 152(8) and 158(a)(1)-(5). If Congress wanted the NLRB and only the NLRB to determine just cause, it could have defined the term as it did with the prohibited conduct it assigned to NLRB scrutiny. *See, e.g., Zapata Haynie Corp. v. Arthur,* 926 F.2d 484, 487 (5th Cir. 1991); Holmes, *The Theory of Legal Interpretation* 12 Harv. L. Rev. (1898). Indeed, in 1947 Congress refused to amend the NLRA to give the Board unfair labor practice jurisdiction over all matters arising under collective bargaining agreements. S. Rep. No. 105, 80th Cong. 1st Sess., 20-21 (1947), H.R. Rep. No. 245, 80th Cong. 1st Sess., 21 (1947).

Third, the just cause proviso in section 10(c) has significance independent of the discrimination provisions in section 8(a)(3) and (4). If Congress had intended "just cause" under the Act to be no more than a synonym for "non-discrimination," the logical thing to do would be to use the terminology in the same section of the Act. As explained by one authority on statutory construction:

> [T]he distinction between a subsection and an independent section of a statute is that the subsection, by its nature, is placed within a context and thereby limited to the degree that the independent section is not.

2 A. N. Singer, *Sutherland Statutory Construction* (5th ed. 1992), § 47.01. The just cause proviso is *not* a subsection of section 8(a) and by inference its meaning is *not* limited by that section. To the contrary, just cause means much more than non-discrimination for union activity or participation in Board proceedings.

Fourth, giving a meaning to the term just cause broader than the inverse of conduct prohibited by sections 8(a)(3) and (4) is consistent with the evolution of collective bargaining and labor relations law in this country. Before the Act was amended in 1947, it already prohibited discriminatory and retaliatory terminations. National Labor Relations Act §§ 8(3) and (4), 29 U.S.C. §§ 158(3) and (4) (1935).[2] The language used for defining employer unfair labor practices was carried over largely unchanged from the original NLRA (The Wagner Act) to the amended NLRA (The Taft-Hartley Act) in 1947.

In contrast to prohibited unfair labor practices, the term just cause was nowhere to be found in the NLRA before it was amended in 1947. The term was commonly used in collective bargaining agreements between labor unions and employers, however, as a standard by which to evaluate the right to terminate employees. *See, e.g., Rubberset Co.,* 1 LA (BNA) 471 (1945), *Verdun Mfg. Co.,* 10 LA (BNA) 637 (1947). *See also* A. Cox, *Cases on Labor Law* (1948), at 214-15, 343-44; BNA Contract Clause Finder (1945) § 40.13; L. Teller, *Labor Disputes and Collective Bargaining* (1940), at 506-07. In the industrial relations setting, just cause as a restraint on termination of employment was predominantly a concept of labor arbitration. Logic would dictate that Congress adopted this term with the understand-

[2]The original version of the NLRA was known as the Wagner Act. Act of July 5, 1935, c. 372, 49 Stat. 452.

ing that it was a term of art and would continue to be applied by duly selected labor arbitrators even in the face of pending unfair labor practice charges. *See, e.g., Perera v. Siegel Trading Co.*, 951 F.2d 780, 783 (7th Cir. 1992) (by using a term of art Congress intended to retain the term's pre-established meaning); *Stedor Enters v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991) (same).

In summary, before the NLRA was amended in 1947, it already prohibited discriminatory and retaliatory terminations. There would have been no purpose to the amendment adding the just cause proviso if a ruling in a former employee's favor under sections 8(a)(3) or (4) necessarily meant her termination was without just cause. Section 10(c) cannot be presumed to be redundant, and the most plausible view of Congress' intent is that just cause under section 10(c) means more than simply a termination that does not violate sections 8(a)(3) or (4).

D. There is A Square Conflict In The Circuits Over The Availability Of Equitable Relief To An Employee Who Testified Dishonestly In An Administrative Proceeding Under The NLRA.

Michael Manso testified untruthfully when he told the Administrative Law Judge that he was late for work on August 17 because his car broke down. To borrow Judge Maloney's words — "Manso was lying." (Appendix B-59). The Board did not take issue with Judge Maloney's findings and it is plain from the record that Manso made up a story he knew to be untrue.

Other than the Tenth Circuit, the courts have refused reinstatement of an employee unlawfully discharged when the employee was guilty of unlawful or offensive conduct that would "bid ill for all concerned if renewal of the relationship were compelled." *See, e.g., NLRB v. Magnusen*, 523 F.2d 643 (9th Cir. 1975) (reinstatement improper where employee lied on the stand and falsified timecard); *NLRB v. Commonwealth Foods, Inc.*, 506 F.2d 1065, 1067 (4th Cir. 1974) (reinstatement improper where employee failed polygraph); *Northstar Refrigerator Co.*, 207 NLRB 500 (1973), *modified sub. nom., NLRB v. Magnusen*, 523 F.2d 643 (9th Cir. 1975) (reinstatement of an employee who committed perjury is improper). If the Board's order of reinstatement is enforced, Manso will be rewarded for lying to ABF and lying to Judge Maloney. Even when there is evidence that an unfair labor practice occurred, the purposes of the Act are better served by confining the award to declaratory relief and notice posting, not to an award that reinforces false testimony.

Recently, in *Precision Window Manufacturing v. NLRB*, 963 F.2d 1105 (8th Cir. 1992), the Eighth Circuit refused to enforce an NLRB order requiring reinstatement of an employee who lied under oath in a ULP hearing. In that case, the employer said it terminated the employee for lying to his supervisor about inability to work on a Saturday. The employee/charging party testified untruthfully that he was passing out union cards before his dismissal. The ALJ found that the employee was fired for union activity and the lying rationale was employed "for something to pin on" the employee. In refusing to enforce the NLRB order requiring reinstatement, the Eighth Circuit stated:

> This court refuses to take the Board's processes as lightly as the Board apparently does. . . . 'The purposes and policies of the Act do not justify full reinstatement of an employee whose dishonesty has been established and whose untruthful testimony abused the process he now claims should grant him full relief.' Specifically, *an employee forfeits his reinstatement remedy when he purposefully testifies falsely* during an administrative hearing.

Id. at 1110 (citations omitted) (emphasis supplied). The Eighth Circuit added: "No tribunal should be required to plumb the depths of deceit and skulduggery to discover the truth." *See also Iowa Beef Packers, Inc. v. NLRB*, 331 F.2d 176 (8th Cir. 1964); *NLRB v. Magnusen*, 523 F.2d 643 (9th Cir. 1975); *NLRB v. Coca-Cola Bottling Co.*, 333 F.2d 181 (7th Cir. 1964).

In an attempt to distingish *Precision Window*, the Tenth Circuit focused on Manso's original lie to ABF. The court reasoned that Manso had to lie to ABF about why he was late to work to avoid being fired under a policy the NLRB subsequently found to be improper. (Appendix A-1). This distinction is technical and meaningless.

Further, even if there was substance to the distinction offered by Tenth Circuit, the court's rationale is flawed. The court focused only on Manso's original lie—not his perjured testimony. Even assuming Manso was entitled to lie to his employer, no one is entitled to lie to an Administrative Law Judge while under oath and giving testimony.

There is no support for the court's implicit rationalization for Manso's lie. Neither the ALJ nor the Board found that Manso acted with justification. During direct examination, Manso could and should have testified truthfully. (*i.e*, That he had been late to work the second time because he had over-slept, not because he had car trouble). Then he could have explained why he felt compelled to lie to ABF. Instead, Manso chose to commit perjury for an obvious reason: if he could convince the Administrative Law Judge that he was an innocent victim of car trouble, he had an excuse for being late to work. Manso could then argue that ABF terminated him even though he had an excuse. Contrary to the Tenth Circuit's conclusion, Manso's perjured testimony was "highly relevant" to whether ABF terminated Manso for his union activities.

By its decision, the Tenth Circuit has condoned an employee's manipulation of the NLRB process as a means to obtain monetary relief. The Tenth Circuit's decision ignores the defining principle of justice: to seek the truth. Instead, the Tenth Circuit rewards dishonesty and thereby encourages charging parties to lie. There is little to lose and all to gain.

Finally, the Tenth Circuit's decision ignores the rationale in *Precision Window* for denying reinstatement to a perjuror. The policies of the NLRA will not be satisfied by reinstating an employee whose untruthful testimony abused the NLRB process he now claims should grant relief. *Precision Window*, 963 F.2d at 1110. Much to the contrary, the decision by the Tenth Circuit is published approval for untruthful testimony, and that undercuts both the adjudicatory system created by the Act and the integrity of the oath given

by witnesses in all formal legal proceedings. Accordingly, the Tenth Circuit's decision should be overruled.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Tenth Circuit in this case.

Respectfully submitted,

JOHN V. JANSONIUS
Counsel of Record
JILL J. WEINBERG

HAYNES AND BOONE, L.L.P.
3100 NationsBank Plaza
901 Main Street
Dallas, Texas 75202-3789
Telephone: (214) 651-5000
Telecopier: (214) 651-5940

ATTORNEYS FOR PETITIONER
ABF FREIGHT SYSTEM, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that on March 24, 1993 three copies of ABF Freight System, Inc.'s Petition for a Writ of Certiorari were served by first class and postage pre-paid United States mail to the following attorneys of record for all parties:

1. Aileen Armstrong
   Deputy Assistant/General Counsel
   National Labor Relations Board
   Washington, D.C. 20570
   Telephone: (202) 254-8064

2. Solicitor General
   Department of Justice
   Washington, D.C. 20530
   Telephone: (202) 514-2000

3. Joseph P. Kennedy
   1305 Tijeras Drive N.W.
   Albuquerque, New Mexico 87102
   Telephone: (505) 842-6864

B. JAMES OLMSTEAD

4128R/9590H

APPENDIX A—Opinion of the United States Court of Appeals, Tenth Circuit, Decided December 29, 1992.

Jerry MIERA; Andy Trujillo; Albert Miranda; Chad Sullins; Arnold Haynes, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

ABF Freight System, Inc., Intervenor.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

ABF FREIGHT SYSTEM, INC., Respondent.

Nos. 91-9573, 92-9506.

United States Court of Appeals, Tenth Circuit.

Dec. 29, 1992.

On consolidated petition for review and petition for enforcement of National Labor Relations Board (NLRB) decision and order on unfair labor practices claims against national motor freight business, the Court of Appeals, Seymour, Circuit Judge, held that: (1) substantial evidence supported

Board determination that employer did not commit unfair labor practice by discharging casual dockworkers pursuant to its interpretation of contract provision creating new category of "preferential casual" dockworkers or in refusing to reinstate discharged workers unless they signed waivers of their rights under that provision; (2) substantial evidence also supported Board determination under "mixed motive" analysis that discharge of preferential casual dockworker who had filed unfair labor practice charge, purportedly for tardiness, was not for cause; and (3) discharged employee's act of lying to his employer on one occasion about reasons for his tardiness did not rise to level of misconduct requiring denial of reinstatement for public policy reasons.

Review petition denied; enforcement petition granted.

1. Labor Relations ⇐703

Court of Appeals will grant enforcement of National Labor Relations Board (NLRB) order when agency has correctly applied the law and its findings are supported by substantial evidence in the record as a whole.

2. Administrative Law and Procedure ⇐791

Labor Relations ⇐680

Factual findings of National Labor Relations Board (NLRB) are deemed conclusive if, considering record as whole, they are supported by "substantial evidence"; "substantial evidence" is such relevant evidence as reasonable mind might accept as adequate to support conclusion. National Labor Relations Act, § 10(e, f), as amended, 29 U.S.C.A. § 160(e, f).

See publication Words and Phrases for other judicial constructions and definitions.

3. Administrative Law and Procedure ⇐676

Labor Relations ⇐672

Although standard of review of factual findings of National Labor Relations Board (NLRB) is not altered when administrative law judge (ALJ) and Board reach opposite conclusions, ALJ's findings are part of record and must be considered.

4. Labor Relations ⇐560, 565

Substantial evidence supported National Labor Relations Board (NLRB) determination that national motor freight business did not commit unfair labor practice by discharging casual dockworkers pursuant to company's interpretation of contract provision creating new category of "preferential casual" dockworkers and subsequently

refusing to reinstate them unless they signed waivers of their rights under that provision. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

5. Labor Relations ⇐465, 671

National Labor Relations Board (NLRB) did not have to defer to finding in prior arbitration that employee was discharged for cause, and review by Court of Appeals was limited to determining whether Board abused its discretion in choosing not to defer.

6. Labor Relations ⇐560, 614

Under "mixed motive" analysis, substantial evidence supported National Labor Relations Board (NLRB) finding that national motor freight business' discharge of preferential casual dockworker who had filed unfair labor practice charge against it, purportedly for tardiness, was not for cause, and Board thus was not limited to remedy of declaratory relief. National Labor Relations Act, § 10(c), as amended, 29 U.S.C.A. § 160(c).

7. Labor Relations ⇐539

In "mixed-motive" cases, following showing that antiunion animus contributed to employer's decision to discharge employee, burden of proof shifts to employer to show that employee would have been discharged absent any protected union activity.

8. Labor Relations ⇐671

Any error from administrative judge's introduction of, and National Labor Relations Board's reliance on, allegedly irrelevant evidence regarding other employees of national motor freight business was harmless, in light of ample evidence of antiunion animus which by itself supported Board's decision.

9. Labor Relations ⇐614

National Labor Relations Board (NLRB) has wide discretion in assessing whether, in its judgment, a particular remedy will effectuate policies of Act.

10. Labor Relations ⇐614

National Labor Relations Board (NLRB) did not abuse its considerable discretion in deciding that employee's conduct in lying to his employer about the reason for his tardiness on one occasion did not rise to level of misconduct requiring denial of reinstatement, for public policy reasons. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

Paul J. Kennedy, Albuquerque, NM, for petitioners.

Howard E. Perlstein, Supervisory Atty., John H. Fawley, Attorney, Jerry M. Hunter, General Counsel, and Aileen A. Armstrong, Deputy Associate General Counsel, N.L.R.B., Washington, DC, for respondents.

John V. Jansonius and Jill J. Weinberg of Haynes and Boone, L.L.P., Dallas, TX, for intervenor.

Before McKAY, Chief Judge,
SEYMOUR, and KELLY, Circuit Judges.

SEYMOUR, Circuit Judge.

These consolidated appeals come to the court on a petition for review in appeal No. 91-9573, filed by Jerry Miera, Andy Trujillo, Albert Miranda, Chad Sullins, and Arnold Haynes ("Petitioners"), challenging a decision against them by the National Labor Relations Board (the "Board") on unfair labor practice claims against their former employer, ABF Freight System, Inc. (ABF); and on an application for enforcement in appeal No. 92-9506, filed by the Board in connection with another part of that same decision, charging ABF with unfair labor practices against former employee Michael Manso.[1] The cases were consolidated because they arise from the same set of facts and because they both involve review of the Board's Decision and Order reported at 304 NLRB No. 75, 1991 WL 181854 (N.L.R.B.) (1991) ("D & O"). The facts underlying this appeal are detailed in that decision and will be repeated here only in part.

I

The following facts are relevant to our disposition of these appeals. ABF operates a large, national, motor freight business, including a truck terminal in Albuquerque, New Mexico. The Albuquerque facility employs approximately one hundred dockworkers, who are represented by Teamsters Local 492. The majority of ABF's dockworkers are on the regular seniority list, whether employed full or part-time, and enjoy certain benefits as employees under a regional agreement between the union and a multi-employer collective bargaining unit in which ABF participates. In addition, ABF employs casual dockworkers, who originally had no standing as employees under the regional agreement. A 1988

1. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See* Fed. R.App.P. 34(a); 10th Cir.R. 34.1.9. The cases are therefore ordered submitted without oral argument.

supplement to the agreement altered the rights of ABF's casual dockworkers by creating a new category of workers, "preferential casual" dockworkers, who were given certain limited rights. Petitioners, along with Michael Manso, were employed as casual dockworkers at the Albuquerque facility when the supplement became effective.

ABF and the union disagreed as to the meaning of the contract provision creating the new category, and as to the impact of the provision on ABF's existing casual dockworkers. Petitioners, Manso, and others were discharged by ABF pursuant to the company's interpretation of the contract. After the union filed a grievance on behalf of the discharged dockworkers, both the first-step and second-step grievance panels deadlocked. Ongoing negotiations between the union and ABF, while settling the dispute as to some of the discharged workers, did not resolve the grievance as to Petitioners or Manso. During the negotiations, ABF refused to reinstate the discharged workers unless they signed waivers of their rights under the preferential casual contract provision.

Manso and one of the Petitioners, Andy Trujillo, filed an unfair labor practice charge against ABF on behalf of Manso and all of the Petitioners. A third-step

grievance panel subsequently reached a decision requiring ABF to offer reinstatement to the discharged workers as "preferential casuals." ABF complied.

When ABF created its preferential casual list, it also implemented a verification policy for work calls that applied only to preferential casuals. Under the verification policy, a supervisor would ask another union employee to telephone a preferential casual to come to work. If the preferential casual did not answer the call, the union employee would sign a sheet verifying the lack of response. After a preferential casual failed twice to respond to such work calls, ABF could discharge him.

There was testimony that shortly after the discharged dockworkers were reinstated, three of ABF's supervisors individually warned Manso that the company was "gunning" for him. Manso was subsequently discharged for his second failure to respond to a work call, under the new verification policy. Manso filed a grievance. Evidence at the grievance hearing established that a supervisor would not allow the employee calling Manso to redial his number after the employee expressed concern that he had misdialed. Manso was reinstated without backpay.

Not long thereafter, Manso received a disciplinary warning letter after reporting

to work four minutes late. The evidence shows that ABF did not have a tardiness policy at that time, but Manso was warned that he should expect "the worst," including discharge, for future tardinesses. ABF then implemented a tardiness policy applicable only to preferential casuals: two unexcused tardinesses would result in discharge. Manso subsequently reported almost one hour late to work. He provided an excuse for his tardiness; he said that his car had broken down on the freeway. ABF investigated his story and concluded that he was lying. ABF discharged Manso under its tardiness policy. Manso filed a grievance, and repeated his excuse at the first-step grievance hearing. Other evidence contradicted Manso's story and his discharge was upheld at the first-step level. Manso failed to pursue his grievance further, but he filed another unfair labor practice charge against ABF.

II

These appeals arise out of the two unfair labor practice charges. After a hearing on the consolidated cases, an administrative law judge (ALJ) issued a decision that ABF had violated various provisions of the National Labor Relations Act, 29 U.S.C. §§ 141–187, 557 (the Act), in connection with its initial discharge and refusal to

reinstate Manso and Petitioners, and in connection with its subsequent discharge of Manso for failure to respond to work calls. The ALJ found that Manso's third discharge, under ABF's tardiness policy, was a discharge for cause.

On review, the Board disagreed with the ALJ that the initial discharge of Manso and Petitioners was in violation of the Act, and disagreed that Manso's final discharge was for cause. The Board therefore dismissed Petitioners' charges, and ordered ABF to offer reinstatement to Manso and to award him backpay and interest.

[1, 2] We have jurisdiction over these appeals under 29 U.S.C. § 160(e), (f). We will grant enforcement of an NLRB order when the agency has correctly applied the law and its findings are supported by substantial evidence in the record as a whole. *Colorado–Ute Elec. Ass'n, Inc. v. NLRB*, 939 F.2d 1392, 1400 (10th Cir.1991), *cert. denied*, — U.S. ——, 112 S.Ct. 2300, 119 L.Ed.2d 223 (1992). We review questions of law presented by this appeal de novo. *See Facet Enters., Inc. v. NLRB*, 907 F.2d 963, 969 (10th Cir.1990). The Board's factual findings are deemed conclusive if, considering the record as a whole, they are supported by substantial evidence. 29 U.S.C. § 160(e), (f). "Substantial evidence is 'such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion.'" *Facet Enters.*, 907 F.2d at 969 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)). Employing these standards, we affirm the Board's decision and order.

III

In appeal No. 91-9753, Petitioners raise two issues. They claim generally that the Board erred in dismissing their unfair labor practice charges against ABF, and they contend more specifically that the Board erroneously rejected the ALJ's credibility determinations in reaching its ruling. Essentially, they seek a return to the ALJ's ruling that ABF violated the Act in initially discharging them and in refusing to reinstate them.

The ALJ's ruling was based in part on his interpretation of the contract provision creating the preferential casual category. His decision implicitly found ABF's interpretation of the contract unreasonable, and consequently its reliance on that interpretation in discharging Petitioners unreasonable. The Board, on the other hand, found that ABF discharged Petitioners pursuant to a "nondiscriminatory, reasonable, and arguably correct interpretation of the agreement." D & O at *6.

[3, 4] Our standard of review of the agency's factual findings is not altered when the ALJ and the Board reach opposite conclusions; however, the ALJ's findings are part of the record and must be considered. *Harberson v. NLRB*, 810 F.2d 977, 983 (10th Cir.1987). After a careful review of the record on appeal, we conclude that the Board's finding of reasonableness, as well as its ultimate determination that ABF did not violate the Act in discharging and subsequently refusing to reinstate Petitioners, is supported by substantial evidence.

We disagree with Petitioners' argument that the Board rejected the ALJ's credibility determinations in reaching its result. The Board credited the ALJ's credibility determinations, *see, e.g.*, D & O at *5, but differed as to the ultimate import of the evidence. The Board need not reject the ALJ's credibility determinations to conclude that other evidence outweighs or offsets that evidence, compelling a different result.[2]

2. Because we affirm the Board's dismissal of Petitioners' claims against ABF, we need not address ABF's contention that the Board should have deferred to the findings of the National Grievance Committee supporting its arbitration award at the third-step level.

IV

In appeal No. 92-9506, the Board seeks enforcement of its order requiring ABF to pay back wages and interest and to offer reinstatement to Michael Manso following its finding that Manso's discharge was unlawfully motivated. Respondent ABF argues that 1) the Board's order violates section 10(c) of the Act because Manso was discharged for cause, 2) the Board disregarded evidence that Manso was discharged for cause, 3) no evidence supports the Board's inference that the managers who discharged Manso knew he had engaged in protected union activity, 4) the Board improperly relied on evidence about other, non-similar employees, 5) the record does not support the Board's finding of retaliatory animus against Manso, 6) the Board's award of backpay and reinstatement violates public policy, and 7) the Board's order improperly exceeded the scope of Manso's exceptions to the ALJ's decision.

ABF first argues the Board erred in finding that Manso's third discharge was not for cause. Section 10(c) of the Act, 29 U.S.C. § 160(c), prohibits the Board from requiring reinstatement of an individual discharged for cause. ABF points out that the first-step grievance panel found Manso was discharged for cause, and argues that this finding is "final and binding." Respondent's Brief at 21. ABF contends that the Board could therefore not redetermine this fact issue and that its authority under section 10(c) was limited to declaratory relief.

[5, 6] We do not view the Board's authority so narrowly. The Board need not defer to findings in a prior arbitration. *See NLRB v. Gould, Inc.*, 638 F.2d 159, 165–66 (10th Cir.1980), *cert. denied*, 452 U.S. 930, 101 S.Ct. 3065, 69 L.Ed.2d 430 (1981). Deference to such an award is within the Board's "wide discretion," and our review is limited to determining whether the Board abused its discretion in choosing not to defer. *Id.* at 166. Following our review of the record on appeal, we conclude the Board did not abuse its discretion; as we determine below, ample evidence supports its independent finding that Manso's third discharge was not for cause. Accordingly, we also disagree that the Board's authority to fashion a remedy was limited to declaratory relief. *See Interior Alterations, Inc. v. NLRB*, 738 F.2d 373, 377 (10th Cir.1984) (Board has wide discretion in its choice of remedies and is empowered to order reinstatement and backpay).

In concluding that Manso had not been discharged for cause, the Board relied on evidence in the record that Manso was expressly discharged for tardiness, not for lying about his excuse for being late. The

record contains testimony that, had Manso provided a legitimate excuse, he would not have been discharged under ABF's preferential casual tardiness policy. ABF argues that, but for Manso's lying about his excuse, he would not have been discharged; therefore, he was discharged for his dishonesty.

[7] In "mixed-motive" cases such as this one, following a showing that antiunion animus contributed to an employer's decision to discharge the employee, the burden of proof shifts to the employer to show that the employee would have been discharged absent any protected union activity. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395, 103 S.Ct. 2469, 2471, 76 L.Ed.2d 667 (1983); *YMCA of the Pikes Peak Region, Inc. v. NLRB*, 914 F.2d 1442, 1452 n. 10 (10th Cir.1990), *cert. denied*, — U.S. ——, 111 S.Ct. 1681, 114 L.Ed.2d 77 (1991). ABF advances several arguments in support of its contention that the record does not support a finding of retaliatory intent. However, our review of the record reveals abundant evidence of antiunion animus in ABF's conduct towards Manso.

When Manso returned to work at ABF following his first reinstatement, he was warned that the company was out to get him. During the grievance hearing on his second discharge, evidence showed that the

work call verification policy was being used in a discriminatory fashion against Manso. The tardiness policy, under which Manso was discharged for the third time, was applied retroactively to Manso, as his first instance of tardiness occurred before the policy was instituted. We also note that, although the Board did not rely on this evidence, D & O at *7 n. 11 & *9, antiunion animus was demonstrated in ABF's implementation of policies exclusive to preferential casuals.

ABF asserts there was no proof that the managers who discharged Manso—Johnson, Hatfield and Fultz—knew about his protected union activity, and contends such knowledge cannot be imputed to them. However, the record contains evidence that Johnson was served with a copy of Manso's unfair labor practice charge against ABF, and that Hatfield knew generally which employees filed unfair labor practice charges against the company. Hatfield and Johnson received copies of the disciplinary notices sent to employees by Fultz. Moreover, ABF did not offer testimony that Hatfield, Johnson and Fultz lacked such knowledge when they decided to discharge Manso. On this record, the Board could reasonably infer that some or all of these individuals had knowledge of Manso's protected union activity.

We conclude that, under the mixed-motive analysis applicable here, *see YMCA of the Pikes Peak Region*, 914 F.2d at 1452 n. 10, substantial evidence supports the Board's determination that the General Counsel for the Board proved a prima facie case of unlawful discriminatory discharge, and that ABF did not meet its burden of showing that Manso would have been discharged in the absence of his protected union activity. Accordingly, the Board's finding that Manso was not discharged for cause, although contrary to that reached by the ALJ, is supported by substantial evidence in the record. *See Harberson*, 810 F.2d at 983.

[8] In light of our conclusion that ample evidence of antiunion animus exists in the record, we need not consider ABF's contentions that the ALJ allowed introduction of, and the Board relied on, allegedly irrelevant evidence regarding other ABF employees. If introduction of this evidence was erroneous, as ABF argues, it was harmless in light of the evidence discussed above which, by itself, supports the Board's decision.

ABF further argues that the Board's award of reinstatement and backpay to Manso violates public policy because giving these remedies to an employee who lied to his employer and to the ALJ does not effectuate the policies of the Act. ABF relies on cases holding that reinstatement is improper where an employee engaged in serious misconduct. *See NLRB v. Breitling*, 378 F.2d 663, 664 (10th Cir.1967); *see also NLRB v. Magnusen*, 523 F.2d 643, 646 (9th Cir.1975) (employee theft precludes reinstatement); *NLRB v. Commonwealth Foods, Inc.*, 506 F.2d 1065, 1068 (4th Cir. 1974) (same).

[9, 10] The Board has wide discretion in assessing whether, in its judgment, a particular remedy will effectuate the policies of the Act. *See Interior Alterations*, 738 F.2d at 377. We do not believe the Board abused its considerable discretion in deciding that Manso's conduct in this case did not rise to the level of misconduct requiring that reinstatement should be denied. *See id.* at 378. We view *Precision Window Mfg. v. NLRB*, 963 F.2d 1105, 1109–10 (8th Cir.1992), as distinguishable. There the employee lied in the first instance during the administrative hearing by misrepresenting facts that were highly relevant to determining whether he was fired for his union activity. Here, to the contrary, Manso's original misrepresentation was made to his employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of antiunion animus.

Finally, we reject ABF's complaints that 1) the ALJ and the Board "overlooked" evidence of non-discriminatory treatment of preferential casual, and 2) the Board's decision exceeds the scope of Manso's exceptions to the ALJ's decision, as lacking in merit.

The petition for review in appeal No. 91-9573 is DENIED. The petition for enforcement in appeal No. 92-9506 is GRANTED.

APPENDIX B—Decision and Order of the National Labor Relations Board Decided August 27, 1991 and the Decision of the Administrative Law Judge Decided March 21, 1990.

SCD

D—2223
304 NLRB No. 75 Albuquerque, NM

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ABF FREIGHT SYSTEM, INC.

and

MICHAEL MANSO and ANDY TRUJILLO, Individuals
MICHAEL MANSO, an Individual

Cases 28—CA—9500
28—CA—9916

DECISION AND ORDER

On March 21, 1990, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed

exceptions and a supporting brief, the Charging Parties filed a brief in reply to the Respondent's exceptions, Charging Party Michael Manso filed cross-exceptions and a supporting brief, and the Respondent filed a brief answering the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

In Case 28—CA—9500 (Case 9500) of this consolidated proceeding, the judge found that in June 1988 the Respondent threatened six of its casual dockworkers with discharge if they refused to waive rights under the collective-bargaining agreement, and then discharged and subsequently refused to reinstate them because of their refusals, in violation

[1]The Respondent's June 25, 1990 motion to strike Charging Party Manso's cross-exceptions and brief is denied as lacking in merit. The Board exercised appropriate discretion in response to the Charging Party's timely requests for extensions of time to file his papers. Further, assuming the truth of the Respondent's allegation that it did not receive notice of the April 26, 1990 extension request, it is clear that the Respondent did receive the Charging Party's May 18, 1990 request for an extension of time, and it has made no specific showing of prejudice by the Charging Party's failure to provide notice of its initial request.

The Respondent's July 16, 1990 supplemental motion to strike the Charging Policy's cross-exceptions and brief, alleging their lack of compliance with the Board's Rules and Regulations, is also denied. Although not conforming exactly to the requirements of Sec. 102.46, the cross-exceptions and brief are not so deficient as to warrant striking.

[2]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

of Section 8(a)(3) and (1) of the Act. In Case 28—CA—9916 (Case 9916), the judge found that in June 1989, following reinstatement of the dockworkers pursuant to a grievance/arbitration award, the Respondent violated Section 8(a)(4), (3), and (1) by discharging one of them, Michael Manso, because he had filed an unfair labor practice charge and had taken part in the dockworkers' contractual grievance. Manso was subsequently reinstated again pursuant to the grievance/arbitration procedure, and in August 1989 he was again discharged. The General Counsel alleged that this also violated Section 8(a)(4), (3), and (1). The judge, however, found that Manso was discharged for cause, i.e., dishonesty.

On our careful review of the record, we have determined that there is insufficient evidence to support the General Counsel's allegations and the judge's unfair labor practice conclusions in Case 9500 and, consequently, we dismiss that entire portion of the complaint. In Case 9916, we affirm the judge's finding that Manso was unlawfully discharged in June 1989, but we reverse the judge's dismissal concerning Manso's August 1989 discharge, concluding that it also was in violation of Section 8(a)(4), (3), and (1). The facts set forth below are drawn from the judge's relevant findings of fact, including his credibility resolutions, and from facts undisputed in the record. As we have indicated above, we affirm the judge's findings only to the extent they are consistent with this decision.

I. Case 9500

A. Facts

The Respondent's dockworkers at its Albuquerque, New Mexico trucking terminal, both those on the regular sen-

iority list and those employed on a casual basis, are covered by the Western States Area Agreement for local cartage workers and dockworkers, a supplement to the Teamsters' National Master Freight Agreement. Prior to spring 1988,[3] casual dockworkers under the supplemental agreement were afforded sharply limited rights; in particular, there were no seniority provisions covering casuals with respect to work calls and progression to regular dockworker status. Thus, the Respondent chose freely among the casuals to satisfy its fluctuating dock work requirements and, when a regular dockworker position opened up, the Respondent was not obligated to fill it from among the casuals. The new supplemental agreement concluded in April changed the employment practices concerning casuals. Article 60, section 4(e) (section 4(e)) of the supplemental agreement provided in relevant part:

> (e) Any casual . . . used by the Employer for seventy (70) eight (8) hour shifts within six (6) consecutive months, shall be automatically processed by the Employer to determine whether the casual meets the Employer's hiring standards and qualifications. Such processing shall be completed within thirty (30) calendar days of the last day of the seventieth (70) shift.
>
> Automatic processing may be waived with a written agreement between the individual, the Local Union, and the Employer.
>
> After such processing, if the casual employee meets the Employer's hiring standards and qualications for regular employment, he/she shall be placed on a preferential hiring list for future regular em-

[3]All dates in this section of our decision are in 1988 unless otherwise noted.

> ployment and shall be selected for regular employment in the order in which he/she was placed on the preferential hiring list and he/she shall not be subject to any probationary period. His/her seniority date will be the date he/she is put on the seniority list. Failure of the employer to add casuals from the preferential hiring list in this order shall subject the Employer to runaround claim.
>
> Casual employees who are placed on the preferential hiring list and who meet the Employer's hiring standards and qualifications for regular employment shall have regular monthly health and welfare contributions paid by the Employer on their behalf as set forth in Article 52, Section 1, Health and Welfare, the month following the month such casual first becomes eligible for regular employment. Such contributions shall continue to be paid by the Employer each month thereafter provided the preferential casual satisfies the forty (40) hour eligibility requirement provided in Article 52. Preferential casuals who qualify for regular health and welfare contributions shall also be eligible for regular health and welfare benefits each month a regular contribution is paid by the Employer on their behalf.
>
> If the casual employee does not meet the Employer's hiring standards and qualifications or refuses to accept regular employment while on the preferential hiring list, the casual and the Local Union shall be so notified in writing and his/her use as a casual will be discontinued.
>
> Casual employees on the preferential hiring list shall be offered available extra work in seniority order by classification, as among themselves. The Employer shall not be obligated to make more than

> one (1) call per casual per day and such call need not be verified. However, abuse of this procedure will be subject to the grievance procedure. Further, casuals on the preferential hiring list shall have access to the grievance procedure in the event of disciplinary action.
>
> When an Employer utilizes eight (8) hour supplemental casuals thirty (30) or more days in any two (2) consecutive calendar months, the Employer shall add one (1) regular employee from the preferential hiring list.

Thus, the new procedure applied preference by seniority as to casual work opportunities and regular employment for those casuals placed on the "preferential hiring list."

Soon after the new agreement was reached, a dispute developed between the Respondent's representatives at the Albuquerque terminal and representatives of Teamsters Local 492, bargaining agent for the Respondent's dockworkers, concerning the qualifications for placement on the preferential list pursuant to the terms of section 4(e). The Respondent interpreted the relevant provisions as establishing a time prerequisite—70 work shifts within 6 consecutive months—which, if satisfied, set in motion an "automatic processing" of the casual to determine if he met the Respondent's employment qualifications for a regular dockworker position. If the casual met those qualifications, he would be placed on the preferential list. If not, according to the Respondent's reading, the contract required that he be terminated. The Union interpreted section 4(e) to mean that all casuals meeting the time requirements alone must automatically be placed on the preferential list; once on the list, it would be the Respondent's obligation to train all of them to meet regular dockworker qualifications in preparation for future employment opportunities. Fueling this disagreement was the understanding of both the Respondent and the Union that most of the casual dockworkers were not qualified to drive tractor-trailer rigs—a requirement for regular dockworker employment with the Respondent for about 10 years. At some point prior to June 20, the Respondent offered the Union a compromise position for application of the contract language; the Respondent would place casuals on the preferred list if they satisfied the time requirements, but would be under no duty to train them in order to meet the requisite qualifications until a regular dockworker position became available. The Union did not accept this offer.

Under the new agreement, May 29 was the starting date for initial application of the "automatic processing" provisions of section 4(e). Accordingly, under the Respondent's interpretation, within 30 days from that date, all casuals meeting the time requirements had either to be placed on the preferential list, and thus considered qualified for regular employment, or be terminated. The Respondent's review of its personnel files established that 12 casuals met the time requirements and that none of them was driver qualified.

On June 20, the Respondent forwarded the following letter, signed by the terminal manager, to the 12 casuals:

> In accordance with Article 60, Section 4(e) of the Western States Area Pickup and Delivery, Local Cartage and Dockworker Supplemental Agreement, this is to advise you that you do not meet ABF's hiring standards and qualifications for regular employment. Therefore, your name cannot be added to a preferential hiring list as referred to in the aforementioned Article and your use as casual is being discontinued effective immediately.

In addition, at about the same time, the Respondent's operations manager, Robert Herrington, had discussions with several of these casuals to explain their discharges. It is apparent from the record that these conversations followed the same basic pattern, the essential focus being the meaning of the June 20 discharge letters, the casuals' lack of driver qualifications, the Respondent's view of its contractual duties under section 4(e), and the Union's disputed interpretation. In some of these discussions, and within the context above, Herrington said, to one or another of the discharged casuals, that the Respondent did not want to let the casuals go, that it was concerned about the possibility of putting nondriver-qualified casuals on the preferential list, that the Respondent was not going to have a preferential list and this was the reason for the layoffs, that their terminations were the Union's fault, that the Union was not going to tell the Respondent whom it would hire, and that the Respondent did not want the preferential list and preferred the previous process for hiring regular dockworkers.

On June 21, the Union filed a contractual grievance on behalf of all the discharged casuals. The formal grievance procedure provided for a three-step process of hearings and review before joint panels of union and employer representatives. At about the time of the first step of the procedure, on June 29, Herrington offered the discharged employees reinstatement if they would agree to the waiver procedure set forth in the second paragraph of section 4(e). In the Respondent's interpretation, although the waiver of automatic processing was a waiver of the right to be considered for placement on the preferential list, it was also an alternative to the harsh edge of section 4(e)—discharge if the "processed" casual dockworker did not meet regular employment qualifications. Eventually, 5 of the 12 casuals, with the apparent concurrence of the Union, agreed to the contractual waivers and returned to work.[4] In addition, the Respondent determined on a further review of one casual's personnel record that he was in fact driver qualified as a result of previous employment, and it placed him on its regular dockworker seniority list. The remaining six—the alleged discriminatees in this case—did not agree to the waivers.

The first-step grievance panel deadlocked on the dispute. Soon thereafter, the Respondent renewed its compromise offer: immediate placement of all time-qualified casuals on the preferential list, but no driver training obligation until a regular dockworker position became available. The Union again was unwilling to accept this. The second-step grievance panel also deadlocked on the contractual question. On April 6, 1989, the third-step panel resolved the dispute by nullifying the contractual waivers that five of the grievants had signed, denying all monetary claims, and adopting, in essence, the Respondent's previous compromise offer.[5] Accordingly, the Respondent, *inter alia*, offered reinstatement

[4]The Respondent's waiver offer was belated in the circumstances, as sec. 4(e) indicates that it should be offered prior to automatic processing. Although the record offers no explanation for this, it is established, in any event, that the Union agreed to the late offer.

[5]We affirm the judge's conclusion that deferral to the award of April 6, 1989, is inappropriate in Case 9500, but we find it necessary to rely only on the ground that there was inadequate consideration of the unfair labor practice issues pursuant to *Olin Corp.*, 268 NLRB 573 (1984). The record establishes that no evidence pertinent to the 8(a)(1) and (3) allegations, e.g., Harrington's alleged unlawful statements to the casuals, was placed in the record of the contractual proceeding, and thus the panel which determined the award was presented only with contractual issues and not with facts relevant to resolving the alleged unfair labor practices. See, e.g., *M & G Convoy*, 287 NLRB 1140, 1145 (1988); *Dick Gidron Cadillac*, 287 NLRB 1107, 1111 (1988). For the same reasons, we find no merit in the Respondent's motion for reconsideration of the Board's denial of the Respondent's prehearing summary judgment motion seeking deferral to the award.

(Footnote continued on next page.)

to the alleged discriminatees and placement on the preferential list effective April 24, 1989, and an opportunity for qualifying driver training when regular dockworker openings occurred.

B. Discussion

Case 9500's complaint alleges that the Respondent violated Section 8(a)(1) by Herrington's statements to casual employees on June 20 that they were being discharged without regard to the terms of the collective-bargaining agreement and that the Respondent would not allow the Union to dictate whom the Respondent would hire. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) on June 20 by discharging the six alleged discriminatees in order to prevent them from exercising their contractual rights to be placed on the preferential list. Finally, the complaint alleges that, about June 29, the Respondent violated Section 8(a)(3) and (1) by demanding that the six casuals sign waivers of their contractual rights as a condition of reinstatement, and by refusing to

(Footnote continued.)

Regarding our colleague's concurring opinion, we find it noteworthy that Case 9500's complaint allegations charged unlawful discrimination under Sec. 8(a)(3) and unlawful interference with protected rights under Sec. 8(a)(1). Although our final disposition of these issues is premised on the finding that the Respondent acted solely on the basis of a reasonable and arguably correct interpretation of the relevant contractual provision, the pivotal 8(a)(3) and (1) issues in the complaint involved whether the Respondent's conduct was otherwise unlawfully or discriminatorily motivated. This question of motive, independent of any contract interpretation question, is most starkly revealed in the 8(a)(1) allegation that Respondent's Herrington told employees they were being discharged *without regard to the terms of the collective-bargaining agreement*, an allegation which directly affected the 8(a)(3) issue. In view of this, and the absence of any indication that the arbitration panel was presented with any factual issues raised by the complaint allegations, we find no basis for concluding that there was adequate arbitral consideration of the statutory issues before us.

reinstate them until April 1989 because they declined to sign the proffered waivers.[6]

The judge, in conclusions at variance with the complaint allegations and his own factual findings, determined that on June 20 Herrington told the alleged discriminatees that they were being discharged because they had refused to sign waivers of their contractual rights to be placed on the preferential list, thus violating Section 8(a)(1), and that they were in fact discharged in violation of Section 8(a)(3) and (1) because they refused to sign such waivers.[7] The judge further found that on June 29 and thereafter, the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate the casuals unless they signed waivers.

With respect to the judge's 8(a)(1) finding, it is clear from the record that on or about June 20 neither Herrington nor any other agent of the Respondent told the casuals that they were being discharged for refusing to sign waivers of their contractual rights. The matter of waivers, discussed below, did not arise until June 29. Further, there is no other evidence concerning Herrington's discussions with the casuals on June 20 that establishes an 8(a)(1) violation, as alleged in the complaint or otherwise. The context for his various statements was the dispute between the Respondent and the Union over the meaning of section 4(e), i.e., he was explaining the termination letters received by the casuals in light of the Respondent's view of its obligations under section 4(e)—a tenable view, as noted below—and he was also rejecting the Union's contrary position. In these circum-

[6]No 8(a)(5) allegation was made in the complaint, and the Union is not a party to this proceeding.

[7]In his posthearing brief, the General Counsel, abandoning the specific 8(a)(3) and (1) complaint allegations, urged this unlawful waiver theory concerning the Respondent's June 20 conduct.

stances, Herrington's statement that the reason for the terminations was that the Respondent was not going to have a preferential list was as likely a reference to the fact that none of the time-eligible casuals was driver qualified—thus providing no basis for a list—as it was an arguable interference with employees' statutory rights. His statements critical of the Union—that the Union would not dictate hiring decisions to the Respondent, that the discharges were the Union's fault—and his expression of dislike for the preferential hiring procedure, may be reasonably taken as a response to the Union's opposing interpretation of section 4(e) and the ramifications of the Union's position, which, in the Respondent's view, amounted to a contractually unwarranted interference in its training and hiring decisions with respect to jobs that entailed driving tractor-trailer rigs. Any possible inference that the hostility expressed by Herrington was attributable to animus against employees for exercising statutory rights is outweighed by Herrington's statements regarding the Respondent's reluctance to let the casuals go, the concern the Respondent felt at the prospect of putting employees not qualified to drive on a preferred list for regular dockworker employment, and the Respondent's obligation to comply with the contract as it interpreted it. Accordingly, there is sufficient ambiguity in Herrington's statements for us to conclude that the evidence does not establish a violation of Section 8(a)(1).

Further, regarding the specific complaint allegation that the Respondent discharged the casuals in order to prevent them from asserting contractual rights concerning the preferential list, the General Counsel made no evidentiary showing, and after the hearing did not contend before the judge, that this was the Respondent's motive in discharging the

casuals.[8] More generally, there is on this record a noticeable absence of any protected activity on the casual dockworkers' part that would provide a conceivable basis for finding that the Respondent unlawfully terminated them on June 20. As of that date, none had invoked any perceived right under section 4(e) or other parts of the collective-bargaining agreement, nor had any declined to sign the waiver provided for in section 4(e). Further, there is no other evidence that they had exercised rights protected under the Act. More significant, with respect to the Respondent's motive, the evidence points plainly to the fact that the Respondent's conduct was driven by its understanding of section 4(e). We find that the Respondent's perception of this contract language—specifically the obligation to discharge time-qualified casual dockworkers who did not meet the qualifications and standards for regular dockworker employment—is a nondiscriminatory, reasonable, and arguably correct interpretation of the agreement. See, e.g., *Texaco, Inc.*, 285 NLRB 241, 246 (1987); see also *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162 (3d Cir. 1981). Accordingly, the 8(a)(3) and (1) allegations concerning the Respondent's discharge of the alleged discriminatees are without merit.

By June 29, the alleged discriminatees were engaged in protected, concerted activity—participation in a grievance addressing both their discharges and an appropriate rendition of their contractual rights concerning the preferential list. See, e.g., *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). At that time, Herrington offered to reinstate them to their previous casual employee status if they would agree to the waiver procedure set forth in the second paragraph of section 4(e).

[8]See fn. 7, *supra*.

Although there are situations in which an employer may be found to have engaged in unlawful retaliation against an employee because of his exercise of contractual rights, such is not the case here. As in the case of the alleged discriminatory conduct on June 20, we find no evidence here that the Respondent's conduct in offering the contractual waiver procedure to the casuals was unlawfully motivated, i.e., a matter of retaliation for the employees' engaging in protected activity. Rather, it is apparent that the Respondent was motivated by its interpretation of section 4(e)—specifically, the provision of an alternative procedure that would exempt casual employees from the discharge mechanism in section 4(e), and thus allow for their reinstatement. Implicit in this view was that failure to opt for the waiver alternative required that their terminations pursuant to section 4(e) remain in effect. We find that the Respondent's waiver offer as a method for the discharged casuals to return to their jobs was based on a nondiscriminatory, reasonable, and arguably correct interpretation of section 4(e). See, e.g., *Texaco, supra*. With this motivation established, we conclude that the Respondent's waiver offer and its refusal to reinstate the casuals in the absence of a signed waiver did not violate the Act.

For the foregoing reasons, the unfair labor practice allegations of Case 9500 are dismissed.

II. Case 9916

Alleged discriminatee Michael Manso and another discharged casual dockworker filed an unfair labor practice charge on November 21, 1988, concerning the terminations in Case 9500; they amended the charge twice, on November 28 and December 8, 1988. Manso also participated with the

other discharged casuals in the contractual grievance concerning their discharges and their rights under section 4(e). As set forth above, following resolution of that grievance, Manso and other discharged casuals were offered placement on the preferential list effective April 24, 1989.[9]

Soon thereafter, Manso returned to work, now a "preferential casual dockworker."[10] As more fully detailed in the judge's decision, not long after his return, three of the Respondent's supervisory officials made statements to Manso indicating that the Respondent was seeking to retaliate against him because of his protected activity. On June 19, less than 2 months after his return, Manso was discharged, ostensibly for a second failure to respond to a work call—grounds for discharge under a newly instituted disciplinary policy for preferential casuals. He was subsequently reinstated without backpay pursuant to the contractual grievance procedure. We affirm the judge's findings and conclusions, fully set forth in his decision, that the supervisors' threatening statements and the Respondent's June 19 discharge of Manso violated Section 8(a)(4), (3), and (1).[11]

---

[9]All dates in this section of the decision are in 1989 unless otherwise noted.

[10]At this point the Respondent had three dockworker classifications: those on the regular seniority list, nonpreferential casuals, and preferential casuals.

[11]In affirming this unlawful discharge, we rely particularly on the threatening statements made to Manso and the refusal of the Respondent's supervisor on June 19 to allow the "verifying" employee to redial Manso's telephone number, thereby bringing about Manso's second "failure" to respond to a work call, the purported grounds for his discharge.

We find it unnecessary to rely on the judge's apparent finding that the nature of the Respondent's work call policy contributed to the unlawfulness of Manso's discharge on June 19. To the extent that the judge appeared to find the call policy and related disciplinary matters discriminatory against the preferential casual dockworkers as a class, we note the absence of any pertinent complaint allegations and accordingly we decline to pass on the issue. See our further discussion of the Respondent's disciplinary policies concerning the preferential casuals below.

On August 11, Manso was 4 minutes late for work, and he received a disciplinary warning letter. This was the first time Manso had been late for work. On August 17, Manso was again late for work, this time by almost an hour. As more fully set forth by the judge, he told management officials, in essence, that his car had broken down on the highway, and in the ensuing scramble to get to work, he was stopped by the police for speeding. The Respondent checked his story and ascertained that it was largely a fabrication. By letter dated August 21, Manso was discharged on grounds of tardiness.

Operations Manager Ed Fultz, who signed the discharge letter, made clear in his testimony that Manso was not discharged because of his dishonesty; his lie established only that he did not have a legitimate excuse for the August 17 lateness. Fultz testified that he was discharged under a newly instituted tardiness policy for preferential casual dockworkers: two incidents of lateness result in discharge.

With respect to the Respondent's disciplinary policies and procedures in general, the Respondent's corporate vice president for industrial relations, Howard Johnson, whose responsibility encompassed employee disciplinary policies, testified that no disciplinary rules were ever posted for employees and that there was no uniform disciplinary policy covering dockworkers. More specifically concerning the Albuquerque terminal, Fultz testified that the lateness policy developed for preferential casuals did not apply to regular dockworkers or to nonpreferential casual dockworkers.[12] He also stated that a preferential casual's tardiness had no more or different effect

[12]Testimony and exhibits support the fact that other dockworkers were subject to a less stringent lateness policy, i.e., multiple latenesses resulted in warning letters and then suspensions, at worst, not discharge

We find no merit in the Respondent's exception to the judge's admission of these exhibits. The judge correctly overruled the Respondent's objection at the hearing, finding that the documents at issue were relevant to the alleged unlawful discharge of Manso.

on the operation of the terminal than that of other dockworkers.

According to Fultz, when Manso was late on August 11, it was the first time a preferential casual—a classification that had been in existence only a few months—had been tardy, and there was no specific lateness policy for preferential casuals at that time. In fact, when Manso inquired concerning the consequences for further tardiness, Fultz told him that although he should expect the worst, a policy had not yet been determined. Then, after consultation with the terminal manager and the corporate labor relations department, it was decided that preferential casuals would be discharged if they incurred two latenesses; thus, there would be a warning letter after the first tardiness, and discharge after the second, pursuant to the minimum disciplinary procedures under the collective-bargaining agreement. This reflected, according to Fultz, a strict disciplinary attitude toward preferential casuals as a general theme, because they constituted a new job classification. This policy was decided when the preferential list was established in April.

Fultz further testified that the new lateness policy corresponded with a distinct disciplinary policy that the Respondent had established previously for preferential casuals concerning failure to respond to work calls. In that matter, the Respondent had decided not long after the preferential list was effected that the first failure to respond to a work call would draw a warning letter and the second would result in discharge. Fultz noted that the earlier policy was implemented only after the preferential casuals were given written notification of the Respondent's workshift starting times, thus making clear when the preferential casuals must be available. The record otherwise establishes that, following its implementation, several preferential casuals were discharged under the "two-call" policy.

The judge concluded that because of Manso's dishonesty concerning his explanation for being late on August 17, the Respondent had discharged him for cause and not in violation of the Act. This is a plainly erroneous factual statement of the Respondent's asserted reasons and we reverse it. Fultz's testimony establishes that Manso's false explanation meant that his August 17 tardiness was not an excusable tardiness, and so he was charged with a second lateness—sufficient, in the Respondent's view, for termination. The Respondent provided no evidence that it had treated Manso's dishonesty in and of itself as an independent basis for discharge or any other disciplinary action.[13] Cf., e.g., *Vilter Mfg. Corp.*, 271 NLRB 1544, 1546-1547 (1984), in which the employer established that an employee's dishonesty was a basis under its policies for refusing reinstatement regardless of the employee's protected activities.

In the circumstances of this case, the unlawful statements by the Respondent's supervisors threatening retaliation when Manso first returned to work as a preferential casual and his unlawful discharge on June 19 provide strong evidence of the Respondent's unlawful motivation regarding Manso's August 21 discharge. Thus, just 2 months after his unlawful discharge for grievance activity and filing an unfair labor practice charge, the dischargee, having been reinstated through the grievance procedure, is again discharged, assertedly pursuant to a lateness policy which has just been instituted and of which Manso is the first violator. Further, the evidence shows that the Respondent's dockworkers who are not on the preferential list and who, it is reasonable to

[13]We, of course, do not suggest that giving dishonest excuses for lateness cannot be a legitimate ground for discharge or other disciplinary action. We are simply seeking to determine whether the Respondent *did* discharge Manso for this reason and would have done so even if he had not filed unfair labor practice charges and grievances.

infer, perform work similar to that done by preferential casuals, are treated less strictly concerning tardiness than was Manso, in a work situation where the lateness of a preferential casual has no more impact on the operation of the Respondent's facility than that of the other dockworkers. In view of the above, we find that the General Counsel has provided a sufficient prima facie showing of an unlawful discriminatory discharge under *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981).

The Respondent's burden, in the face of this prima facie case, was to show that it would have taken the same action against Manso even if he had not been engaged in activities protected by the Act. The essence of its asserted defense is that Manso was treated evenhandedly and nondiscriminatorily, pursuant to a disciplinary framework that had previously been developed for the preferential casuals. According to Fultz, a general decision was made at the time the preferential list was put into effect to apply strict disciplinary measures with respect to the preferential casuals, pursuant to no more than the minimum safeguards in the collective-bargaining agreement, because it was a new job classification. A work-call policy was implemented pursuant to this view: preferential casuals were issued warning letters the first time and discharged the second time they failed to respond to a call. The Respondent asserts that the lateness policy for preferential casuals initiated in response to Manso's tardiness, was no more than a routine decision within a disciplinary form already established. When Manso was discharged for a second lateness, according to the Respondent, he was treated similarly to other preferential casuals discharged for a second failure-to-respond under the work-call policy, and not differently than any other preferential casual would have been treated for a second lateness.

The Respondent's disciplinary approach toward the preferential casuals—strict discipline simply because they constituted a new classification—and its lack of uniform disciplinary policies and published rules applicable to all dockworkers raise more questions than they resolve in the context of a defense to an alleged discriminatory discharge. However, we have found it unnecessary to pass on the lawfulness of the Respondent's work-call policy and related disciplinary matters as they affected the class of preferential casuals, see footnote 11, *supra*. In any event, assuming, without finding, the nondiscriminatory character of the Respondent's general disciplinary view and the work-call policy for preferential casuals, and further assuming *arguendo* the consequent legitimacy of the lateness policy in itself, it is apparent that the Respondent's treatment of Manso under the lateness policy was not consistent with its previous conduct within the disciplinary framework for preferential casuals. Fultz testified that preferential casuals accumulated failure-to-respond incidents only after the work-call policy was implemented; a prior failure-to-respond was not held against them. Thus, this policy was applied prospectively, not retroactively. Fultz testified that the lateness policy was not determined until after Manso's August 11 tardiness. He was subsequently discharged because of the August 11 and 17 lateness incidents. However, only the one on August 17 occurred after the policy was instituted. In Manso's situation, the lateness policy was applied retroactively to include the August 11 lateness, distinct from the Respondent's application of the work-call policy. Accordingly, even assuming the validity of its disciplinary treatment of preferential casuals in general, the Respondent has not established that Manso was treated the same way that other preferential casuals would have been treated in similar circumstances.

We conclude that the Respondent has failed to rebut the General Counsel's prima facie case, i.e., that Manso's discharge was unlawfully motivated. Taking account of the General Counsel's case, it is apparent, and we find, that Manso's tardiness on August 17 was seized upon by the Respondent as a pretext to discharge him again and for the same unlawful reasons it discharged him on June 19. Manso's August 21 discharge violated Section 8(a)(4), (3), and (1), and we will issue an order accordingly.

Amended Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(4), (3), and (1) of the Act, we shall order it to cease and desist and to post an appropriate notice.

With respect to affirmative relief, we shall order that the Respondent make Michael Manso whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge on June 19, 1989, from that date until the date of his subsequent reinstatement. We shall further order the Respondent to offer Manso full and immediate reinstatement to his job as a preferential casual dockworker and to make him whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge on August 21, 1989. Interest will be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and backpay will be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

ORDER

The National Labor Relations Board orders that the Respondent, ABF Freight System, Inc., Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge because they have filed charges under the Act or because they have filed grievances under the provisions of a collective-bargaining agreement.

(b) Discharging employees or otherwise discriminating against them because they have filed charges under the Act, or because they have engaged in union or other protected, concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Michael Manso immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered due to the discrimination against him, in the manner set forth in the amended remedy section of this Decision.

(b) Remove from its files any reference to Michael Manso's unlawful discharges and notify him in writing that this has been done and that the discharges will not be used against him in any way.

(c) Preserve and, on request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay dues under the terms of this Order.

(d) Post at its Albuquerque, New Mexico facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[14]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 1991

JAMES N. STEPHENS, Chairman

DENNIS M. DEVANEY, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER CRACRAFT, concurring.

I agree with my colleagues' decision in all respects except that in Case 28—CA—9500 I would defer to the arbitration award under the standards set forth in *Olin Corp.*, 268 NLRB 573 (1984).

There is no dispute that the arbitration proceeding was fair and regular, and all parties had agreed to be bound. The next question is whether the arbitration panel adequately considered the unfair labor practice issue. The Board will find that the arbitrator adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin, supra*, 268 NLRB at 574.

I recognize that the precise 8(a)(1) and (3) allegations of the complaint were not presented to the arbitration panel, but I find that the contractual issue resolved by the panel was factually parallel to the unfair labor practice issue. The contractual issue, as phrased by the Union, was whether the Respondent's treatment of the casuals violated section 4(e) of the contract. The unfair labor practice issue, as phrased by the majority, is whether the Respondent's conduct was based on a reasonable and arguably correct interpretation of section 4(e). Central to both issues is the meaning of the contractual provision. In the course of resolving the contractual issue, the arbitration panel did not entirely agree with the position of the Union or the Respondent, but adopted a middle view that incorporated elements of the positions of both parties. Therefore, I believe that implicit in the award is a determination that both parties' positions were reasonable. Thus, I would find that the arbitration panel decided the contractual issue in such a way as to effectively resolve the unfair labor practice issue.

As to whether the parties generally presented the arbitration panel with facts relevant to the statutory issue, the record shows that the panel received ample evidence. That certain evidence (i.e., Operations Manager Herrington's statements to the casuals) was not presented to the panel does not defeat a finding that the panel was generally presented with the facts relevant to the statutory issue. See my concurring opinion in *Haddon Craftsmen,* 300 NLRB No. 100 (Nov. 30, 1990).

Finally, contrary to the General Counsel's contention, I would find that the award is not clearly repugnant to the Act. In this connection, I note that the panel's failure to award backpay does not, standing alone, render the award clearly repugnant. See, e.g., *Crown Zellerbach Corp.,* 215 NLRB 385, 387 (1974).

In sum, the General Counsel has failed to show any defects in the arbitration award that warrant failure to defer. On this basis, I join my colleagues in dismissing the unfair labor practice allegations in Case 28—CA—9500.

Dated, Washington, D.C. August 27, 1991

MARY MILLER CRACRAFT, Member
NATIONAL LABOR RELATIONS
BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutural aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with discharge because they have filed charges under the National Labor Relations Act or because they have filed grievances under the provisions of a collective-bargaining agreement.

WE WILL NOT discharge employees or otherwise discriminate against them because they have filed charges under the National Labor Relations Act or because they have engaged in union or other protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Michael Manso immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his unlawful discharges, with interest.

WE WILL notify him that we have removed from our files any reference to his unlawful discharges and that the discharges will not be used against him in any way.

ABF FREIGHT SYSTEM, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 234 North Central Avenue, Suite 440, Phoenix, Arizona 85004-2212, Telephone 602—261—3188.

JD—55—90
Albuquerque, NM

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ABF FREIGHT SYSTEM, INC.

and

MICHAEL MANSO, An Individual

and

ANDY TRUJILLO, An Individual

Cases Nos. 28—CA—9500 and 28—CA—9916

Lewis S. Harris, Esq., of Albuquerque, New Mexico, for the General Counsel.

John V. Jansonius, Esq., of Dallas, Texas, for the Respondent.

DECISION

I. Findings of Fact

A. Statement of the Case

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before the undersigned upon two unfair labor practice complaints,[1] issued by the Director or the Acting Director of the Board's Twenty-Eighth Region and consolidated for hearing, which allege that Respondent ABF Freight System, Inc.,[2] violated Sections 8(a)(1), (3), and (4) of the Act. More particularly, the two complaints allege that the Respondent threatened casual dock workers

[1]The principal docket entries in this case are as follows:

Charge filed by Michael Manso and Andy Trujillo, two individuals, against the Respondent in Case No. 28—CA—9500 on November 21, 1988, and amended on November 28, 1988, and again on December 8, 1988; Complaint issued against the Respondent in Case No. 28—CA—9500 by the Acting Director of Region 28 on September 21, 1989; Respondent's Answer filed on November 3, 1989; Charge filed by Michael Manso, an individual, against the Respondent in Case No. 28—CA—9916 on September 1, 1989; Complaint issued against the Respondent in Case No. 28—CA—9916 by the Director of Region 28 on October 13, 1989, and consolidated with the Complaint in Case No. 28—CA—9500 on the same day; Respondent's Answer filed on October 26, 1989; Respondent's First Amended Answer to both complaints filed on December 15, 1989; Respondent's Second Amended Answer filed on January 6, 1990; Hearing held in Albuquerque, New Mexico, on January 9 and 10, 1990; Briefs filed with the undersigned by the General Counsel and the Respondent on or before February 12, 1990. The Respondent also filed a reply brief in this case. There is no provision under the Board's Rules and Regulations for the filing of a reply brief with an administrative law judge. Accordingly, that brief will be stricken and its contents will be disregarded.

[2]Respondent admits, and I find, that it is a Delaware corporation. It is engaged in the interstate transportation of freight and maintains a terminal for that purpose at Albuquerque, New Mexico. During the preceding
(Footnote continued on next page.)

employed at its Albuquerque terminal with discharge in violation of an outstanding collective bargaining agreement and then discharged six casual employees on or about June 20, 1988, because they refused to sign waivers of their rights under the existing collective bargaining agreement. The complaints also allege that, after these individuals were reinstated to their former positions, discriminatee Michael Manso, one of the previously discharged casuals, was threatened by several supervisors that the Respondent would retaliate against him for filing a grievance and for filing an unfair labor practice charge. The complaints also allege that, on two different occasions, the Respondent discharged Manso in reprisal for such conduct. The Respondent asserts that the first series of incidents, which were the subject of a grievance and arbitration proceeding, should not be relitigated in a Board proceeding and that the Board should defer to the award of the arbitration panel. It further asserts that the Respondent took the actions it did respecting six casual dock workers because it was obligated to do so by the terms of its collective bargaining agreement, not because of any desire to punish them for asserting their contractual rights. Respondent denies that its supervisors threatened any employees and asserts that Manso was discharged for violating company rules regarding tardiness and making

(Footnote continued.)
twelve-month period, the Respondent, in the course and conduct of the aforesaid business, derived gross revenues from the transportation of freight and other commodities from the State of New Mexico directly to points and places located outside the State of New Mexico valued in excess of $50,000. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sections 2(2), 2(6), and 2(7) of the Act. Local 492, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called Union) is a labor organization within the meaning of Section 2(5) of the Act.

oneself available to respond to work calls. Upon these contentions the issues herein were joined.[3]

B. The Unfair Labor Practices Alleged

Respondent operates a large motor freight business throughout the United States and, through membership in a multi-employer association, is a party to the Teamsters National Motor Freight Agreement. Included in its operation are about 150 truck terminals in the western United States. Through membership in a regional multi-employer association, the Respondent is also a party to the Western States Area Agreement, which contains a supplemental agreement covering local cartage and dockworkers. One of the Respondent's large western facilities is a break bulk terminal at Albuquerque, New Mexico, where it employs approximately one hundred dockworkers. They are engaged not only in loading and unloading freight originating in or destined for Albuquerque but also in breaking down and reshipping freight passing through that area destined for other locations.

Most of the Respondent's Albuquerque dockworkers are on its regular seniority list and are entitled to select shifts based upon their date of permanent hire.[4] Because its daily demand for dockworker employees fluctuates, some 15% of those on the regular dockworker seniority list are employed

[3]The transcript herein is hereby corrected as follows:

1. On page 42, line 22, change "would bow to" to "The Board would"

2. On page 514, line 15, delete "no"

[4]The Respondent operates its Albuquerque facility on a twenty-four hour, seven-day week basis, and has five overlapping eight-hour shifts, which begin at midnight, 5 a.m., 8:30 a.m., 3:30 p.m. and 5 p.m.

on an on-call basis. While they are assured of a forty-hour workweek, the so-called "fifteen percenters" do not work fixed shifts and must remain available for calls as needed. They are guaranteed a break of at least sixteen hours between shifts and need not remain available for call after working forty hours in any given week.

In addition, the Respondent employs casual dockworker employees, who are employed from time to time on eight-hour shifts and who must make themselves available for assignment in much the same manner as a regular "fifteen percenter." However, a casual has no standing under the contract as an employee and is not guaranteed any particular amount of employment. He may work forty hours one week and eight hours or no hours the next week. The Respondent may discontinue a casual employee by the simple stratagem of not calling him to work. While there may be some inconsistency in the record, it appears that regular casual employees have no standing under the grievance and arbitration machinery[5] and have different health benefit costs because they may not work the full forty hours in a month necessary to entitle an employee to health benefits. At least at one time, regular casuals did not receive premium pay for holiday work. Respondent employs casuals in any significant numbers only at its Albuquerque and Los Angeles terminals.

[5]Respondent's witnesses testified that regular casuals have no contractual right to file grievances. There is certainly nothing in the contract which clearly confers such a right on regular casuals, as distinguished from preferential casuals. In the arbitration award which is at issue in this case, the Respondent interposed an objection at the first stage of the grievance procedure that the casuals who were the subject of the grievance had no standing to complain. Notwithstanding this objection, the grievants did obtain substantial relief in the final award. In this proceeding, where it served the Respondent's purpose to admit that regular casuals have standing to complain under the grievance procedure, the Respondent took two opposite positions on this point in the course of a five-minute colloquy.

As a result of this practice, the Respondent's terminal at Albuquerque enjoyed a hiring arrangement under which it could tailor its work force to the ebb and flow of daily traffic without incurring any permanent responsibility to a large group of needed employees. Since regular casuals did not, and still do not, enjoy seniority, the Respondent could call some of these individuals to work at random while ignoring others; it had no obligation whatsoever to hire any casual if and when vacancies occurred among its cadre of regular dockworkers, regardless of how long the casual might have worked for the Respondent. If a likely prospect for a dockworker job appeared at the employment office, he could be hired for a permanent position in preference to a casual employee who might have been on call and on the payroll for years. The presence of a large number of experienced casuals to supplement its regular complement of employees meant that the Respondent had available a possible source of qualified replacements in the event of a strike.

The 1988 Western States Area Agreement put a substantial crimp in this practice. The local cartage and dock worker supplement to this Agreement introduced a new concept, namely that of a preferred casual, who was given a standing not previously accorded to anyone who was not on the regular seniority list. Art. 60, See. 4, of the 1988 contract provides:

> (e) Any casual or non-seniority owner-driver used by the Employer for seventy (70) eight (8) hour shifts within six (6) consecutive months, shall be automatically processed by the Employer to determine whether the casual meets the Employer's hiring standards and qualifications. Such processing shall be completed within thirty (30) calendar days of the last day of the seventieth (70) shift.

> Automatic processing may be waived with a written agreement between the individual, the Local Union, and the Employer.
>
> After such processing, if the casual employee meets the Employer's hiring standards and qualifications for regular employment, he/she shall be placed on a preferential hiring list for future regular employment and shall be selected for regular employment in the order in which he/she was placed on the preferential hiring list and he/she shall not be subject to any probationary period. His/her seniority date will be the date he/she is put on the seniority list. Failure of the employer to add casuals from the preferential hiring list in this order shall subject the Employer to a runaround claim.
>
> Casual employees who are placed on the preferential hiring list and who meet the Employer's hiring standards and qualifications for regular employment shall have regular monthly health and welfare contributions paid by the Employer on their behalf as set forth in Article 52, Section 1, Health and Welfare, the month following the month such casual first becomes eligible for regular employment. Such contributions shall continue to be paid by the Employer each month thereafter provided the preferential casual satisfies the forty (40) hour eligibility requirement provided in Article 52. Preferential casuals who qualify for regular health and welfare contributions shall also be eligible for regular health and welfare benefits each month a regular contribution is paid by the Employer on their behalf.
>
> If the casual employee does not meet the Employer's hiring standards and qualifications or refuses to accept regular employment while on the

preferential hiring list, the casual and the Local Union shall be so notified in writing and his/her use as a casual will be discontinued.

Casual employees on the preferential hiring list shall be offered available extra work in seniority order by classification, as among themselves. The Employer shall not be obligated to make more than one (1) call per casual per day and such call need not be verified. However, abuse of this procedure will be subject to the grievance procedure. Further, casuals on the preferential hiring list shall have access to the grievance procedure in the event of disciplinary action.

When an Employer utilizes eight (8) hour supplemental casuals thirty (30) or more days in any two (2) consecutive calendar months, the Employer shall add one (1) regular employee from the preferential hiring list.

Hence, under the new procedure, the Respondent could no longer use the services of a casual on an indefinite basis. After 70 shifts, a casual had to be placed on the preferential list and, whenever vacancies arose in the regular list, preferential casuals had the right, if qualified, to be hired on a permanent basis. The Respondent was no longer able to hire directly off the street in preference to hiring a long-time casual employee and, to prevent evasion of the meaning and intent of the new provision, a formula was devised to determine when vacancies might exist on the regular dockworker roster which the employer was obligated to fill from the preferential list. To back up the standing of an aspiring dockworker, preferential casuals were given explicit standing to invoke the grievance and arbitration machinery of the contract if subjected to company discipline.

In the spring of 1988, the National Master Freight Agreement between the Teamsters International and, *inter alia*, the Respondent in this case was ratified.[6] Around April 1, 1988, Union Business Agent Gus Trujillo and Union Secretary-Treasurer Ralph Chavez met with Albuquerque Terminal Manager Mike Long, Respondent's Regional Vice-President Sid Hatfield, and Albuquerque Operations Manager Robert Herrington to discuss the question of preferential casuals which had been inserted in the new Western States Area Agreement. The Union took the position that everyone who had completed seventy shifts as a casual employee should be automatically put on the preferential casual list. The Respondent objected, claiming that many of the casual dockworkers were not qualified to be regular dockworkers because they were not also qualified as city drivers. The Union argued that, in the past, the Respondent had permitted casual dockworkers to learn how to drive by operating Company trucks on their own time in the terminal yard. Hatfield said that this would be unacceptable and that casuals would not be allowed to obtain driver experience while on the preferential list. The only time the Company would train a casual was when an opening arose on its list of regular dockworkers. He insisted that any casuals who refused to sign waivers of their right to be placed on the preferential list after working seventy shifts would be fired. I credit Trujillo's testimony that he would not agree to the discharge of any casual employees and to his further statement that he would file a grievance if any casuals were discharged because they refused to sign waivers.

---

[6]Actually, 63% of the national membership of the Teamsters voted to reject the contract. However, since the Constitution of the International requires a 2/3rds vote to reject a contract which has been submitted for ratification, the contract in question was deemed approved.

On May 20, 1988, Western Motor Carriers, Inc., the employer association which bargains for the Respondent and other carriers with respect to matters pertaining particularly to western motor carriers, sent its members a letter instructing them that the settlement was retroactive to April 1, 1988, with respect to monetary items and would take effect on May 29, 1988, with respect to non-monetary items, which included the new provisions relating to preferential casual employees at issue in this case. It also informed member employers that they had thirty days, dating from May 29, in which to process casual employees eligible for preferential listing. The letter stated:

> If you do not terminate such casuals prior to the end of the 30-day period from May 29, 1988, such casuals will be placed on the appropriate preferential hiring list and will be considered eligible for future hire as regulars as well as for call for available daily casual work.

Thereafter the Respondent reviewed the personnel records at its Albuquerque terminal and determined that twelve individuals had met the seventy shift requirement for preferential treatment. It also determined that none of them were driver-qualified, although this determination was later revised as to one dockworker. Respondent likes to be in a position to utilize dockworkers from time to time to make local pick-ups and deliveries and to act as hostlers, i.e., to drive vehicles about in the terminal yard. For this reason, it has required regular employees to be what it calls driver-qualified, namely to possess a Class 8 New Mexico driver's license, to pass U. S. Department of Transportation health and driver's examinations, and to have two years of experience in operating a tractor-trailer rig—the so-called

eighteen wheeler. Passing a course in driving tractor-trailer rigs is regarded as the equivalent of two years' experience, and, when vacancies have arisen on its regular seniority list, the Respondent has often sent candidates for regular employment to school at Company expense so they can be given qualifying training. While the Respondent's testimony would give one to believe that the driver qualification requirement has been an inflexible prerequisite for regular employment, the record reflects that the Respondent waived this requirement when it purchased two companies, Navajo and East Texas, and absorbed their dockworkers into its own work force.

On June 20, 1988, Respondent gave to all casual dockworkers whom it deemed unqualified for regular employment the following letter:

> In accordance with Article 60, Section 4(e) of the Western States Area Pickup and Delivery, Local Cartage and Dockworker Supplemental Agreement, this is to advise you that you do not meet ABF's hiring standards and qualifications for regular employment. Therefore, your name cannot be added to a preferential hiring list as referred to in the aforementioned Article and your use as a casual is being discontinued effective immediately.

The letter was signed by Mike Long.

In addition to this written communication, Robert Herrington had several conversations with the dockworkers who were being discharged. Herrington told Michael Manso when he handed him his discharge letter that Manso was being laid off because the Company was not going to have a preferential casual list. Manso asked Herrington what he

was talking about so Herrington started explaining the provisions of the new article of the contract pertaining to preferential casuals. Manso then asked Herrington if anything could be done about it, to which Herrington replied, "Not at this time." Herrington went on to repeat that the Company was not going to have a preferential list and the Union was not going to tell them whom it might hire. He went on to explain to Manso that, under the preferential casual provision of the contract, casuals would have to be hired in accordance with their standing on the preferential list and the Company simply would not have such a list.

Herrington also informed casual dockworker Jerry Miera that he would be fired. His statement to Miera was that the latter was being fired "given the situation." When Miera asked why, Herrington replied that Miera had worked seventy shifts during the preceding six months and had been processed but did not meet the Company's qualifications. Herrington then suggested that, if Miera wished to look further into the matter, he should call his union representative and possibly have that part of the contract changed so casuals could get their jobs back. Herrington also told Miera he was sorry to have to fire him because Miera had been one of the Company's better casuals.[7]

After receiving a letter from the Company informing him that he had been discharged, casual dockworker Albert Miranda phoned Herrington. Miranda had been working about 32 to 40 hours a week so he asked Herrington why the Company was taking this action. Herrington replied that the Respondent did not have a preferential hiring list. Miranda then asked Herrington why he had not been permitted to sign a waiver but Herrington gave no answer. Casual dockworker Chad Sullins was told personally by Herrington that

[7]During the weeks preceding his discharge, Manso had been working a full forty-hour week while Miera had been working overtime.

the Company was firing him because he did not meet the Company's qualifications. At that time Sullins had been working five or six days each week. Casual dockworkers Arnold Haynes and Tim Connolly were present so Herrington directed his remarks to them as well. In his testimony concerning this event, Haynes added that Herrington told these employees that they did not meet Company standards, meaning that they did not know how to drive a tractor-trailer. Haynes objected, saying that he thought that the Company was going to send casuals to driving school.[8] Herrington said he was not going to take all twelve casuals who were eligible under the contract for preferential status and send them to driving school because he did not need twelve drivers. He said that he did not want to have a preferred list and wanted to keep on working under the old arrangement. He added that he would prefer to keep on hiring people for regular slots in the way the Company had been doing rather than as the contract provided. He also told the employees present at this conversation that it was the Union's fault that they were being discharged, insisting that he really did not want to fire them because they had been good employees but the contract required him to do so and he had to comply with its provisions.

Later, after a grievance had been filed concerning the discharge of casual dockworkers, Herrington phoned Sullins and offered him an opportunity to sign a waiver of his right to be placed on the preferential list. Sullins declined. Herrington told Sullins that he did not like the idea of a preferential list because it would force him to put people from that list on the regular list. He expressed the opinion that the "end-of-the-break" terminals might benefit from

[8]Herrington had told Haynes when he was first hired that, when the Company was ready to hire a casual as a full-time driver, it would send him to driving school.

such an arrangement because they did not have many casuals, but he did not want to put anyone on the preferential list who was not driver-qualified.

On June 21, 1988, the Union filed a grievance on behalf of all twelve casual dockworkers whom the Respondent discharged. The ultimate award arising out of this grievance disposed of the discharges of the six employees named in the complaints in this case. The other discharges were settled by the parties during the pendency of the arbitration case. On June 29, 1988, the Arizona-New Mexico Joint State Committee heard the grievance at the first step in Albuquerque. According to the standard nationwide Teamster grievance procedure, the first two steps consist of hearings before panels of individuals composed of an equal number of employers and union representatives, none of whom are parties to the immediate dispute. If the first-step panel cannot resolve the grievance by majority vote, the deadlocked case is forwarded to the second step which, in this case, was the Joint Western Area Committee, composed of four employer and four union representatives. If this body deadlocks, and it did, the matter is finally referred to the National Grievance Committee in Washington, composed of the International President of the Teamsters and the Chairman of the national employer bargaining committee. In the event of a deadlock at this level, or if either party is dissatisfied with the national award, either party may resort to self help.

The first step of the grievance was heard at the Howard Johnson Motel in Albuquerque. Hatfield and Herrington spoke with a number of grievants outside the hearing room to discuss the matter at issue. Hatfield was asked why ABF was not going to have a preferential casual list. He replied that the Company did not want one, did not need one, and would hire whom it wanted when it wanted. Herrington told

the grievants who were present that they could have their jobs back immediately if they signed a waiver. Eventually five grievants—Steve Carlson, Jim Olson, Andy Turrietta, Tim Connelly, and Rick Tingley—signed waivers and returned to work. The Respondent reviewed the record of Charles Estrada a second time, determined that he was qualified as a driver, and placed him on its regular dockworker list. After the conclusion of the first-step hearing, Herrington phoned Manso, Sullins, Haynes, and Trujillo and offered to let each of them come back to work if they would sign a waiver. They all declined to do so.

Sometime after the first-step grievance committee deadlocked, Hatfield again spoke with Trujillo about resolving the grievance. Hatfield proposed that all casuals who had worked the qualifying hours set forth in the contract be placed on a preferential list but that the Respondent be under no obligation to offer them driver training until an opening arose on the regular dockworker list. Trujillo insisted that the Company provide driver training to all casuals on the preferred list, a proposal which the Respondent felt would be too costly.

The second-step grievance committee, which met in San Francisco, also deadlocked, thereby forwarding the case to the National Grievance Committee in Washington. In a letter, dated April 6, 1989, the Union and Employer members of the National Grievance Committee resolved the dispute as follows:

> Please be advised that the National Grievance Committee, on April 6, 1989, adopted a motion that, based on the transcript, this case shall be resolved in the following manner:

1. Grievants Carlson, Olson, and Estrada are removed from the grievance inasmuch as their grievances were previously resolved in a manner that is consistent with the decision in this case.

2. Waivers previously executed by several of the employees are null and void.

3. The grievants, excluding the aforementioned three (3), shall be placed on the preferential hire list in the order they completed their seventieth (70th) shift.

4. As regular positions become available, the grievants will be offered regular employment from the preferential hire list and shall not be subject to the thirty (30) day processing period.

5. Driver-qualified grievants will be immediately placed in openings as they become available. Non-qualified drivers will be offered training in ABF's driver training course as their respective openings occur. Appropriate travel and lodging expenses will be paid if training is held outside Albuquerque and they shall be compensated in accordance with ABF's regular training program.

6. If the grievant satisfactorily completes training, he shall be immediately added to the seniority list. If he refuses training or fails the course, his services shall be terminated and not used again.

7. There shall be no money claims paid as a result of this decision.

Of the five casuals who had executed waivers and who had continued to work during the pendency of the grievance, two had been sent to drivers' school and one had been placed on the regular dockworker seniority list. Immediately following the decision of the National Grievance Committee, the Respondent wrote letters to the six grievants who had not signed waivers and offered to re-employ them. The letters read:

> Pursuant to the National Grievance Committee decision in Case #N-4-89-W4, you are being placed on the preferential hiring list in the order in which you completed your 70th shift within six (6) consecutive months.
>
> Effective Monday, April 24, 1989, you will be subject to call for casual work from the preferential hiring list, in the order that your name appears on the list.
>
> As regular positions become available, you will be offered regular employment from the preferential hiring list under the following conditions:
>
> A) You shall not be subject to the thirty (30) day processing period.
>
> B) If you are driver-qualified, you will be immediately placed on the regular seniority roster as openings become available.
>
> C) If you are not driver-qualified, you will be offered training in ABF's Driver Training Course as

respective openings occur. Appropriate travel and lodging expenses will be paid to you if the training course is held outside Albuquerque, and you shall be compensated in accordance with ABF's regular training program.

D) If you satisfactorily complete driver training, you will be immediately added to the regular seniority roster. If you refuse training, or fail the training course, your services will be terminated.

Discriminatees Haynes, Manso, Sullins, and Trujillo returned to work. The others apparently did not, although there is evidence in the record that *Miranda* was on the payroll subsequent to the national decision and was removed thereafter for an attendance-related infraction.

I credit Manso's testimony that, upon his return to the dock, he was greeted with menacing statements from three supervisors. Operations supervisor (foreman) Chris Lovato told Manso that he had better watch his step because ABF was gunning for him. Manso replied that he would do so. Operations supervisor Thomas C. McNutt assured Manso that he had nothing to do with Manso's discharge. He mentioned that he noticed that Manso had been coming to work with a "pissed-off" attitude and suggested that Manso should try to work with a good attitude and things would go a lot easier. McNutt also told Manso to be careful because higher management was after him. Operations supervisor Kyle Beeson told Manso, "Well, you made it back. Let's see how long it takes them to get rid of you this time."

Upon setting up the preferential casual list, the Respondent began to implement a practice known as verification. When a foreman needed a casual dockworker to work on the following shift, he would summon a rank-and-file Teamster

member to place the call. If the preferential casual being called did not answer the phone, the Teamster was then asked to sign a written verification that a call had been placed and that no response was forthcoming, whereupon disciplinary action could be taken for failing to "protect one's shift." A second instance of failing to respond to a call authorized the Company to remove an employee from the preferential casual list and to discharge him.

On May 8, less than a month after his return to work, Manso was given a warning letter for failing to protect his shift, i.e., failing to be available for a call to work which was placed on May 6. On June 19, he received a letter discharging him for again failing to protect his shift, i.e., not being home to receive a call at 5:51 a.m. on that date. The call was verified by a regular dockworker employee, Jeff Motter. Manso grieved the discharge and was reinstated at the first step of the grievance procedure but without pay. At the hearing in this case, Jeft Motter credibly testified that, between 5 a.m. and 6 a.m. on June 19, Supervisor Ronald S. Ford asked him to verify phone calls that were being made to summon casuals to work for the following shift, which was scheduled to begin at 8:30 a.m. Motter said that he was quite tired and thought that he had misdialed Manso's number. When no one answered the call, Motter told Ford that he thought that he might have dialed the wrong number and asked permission to dial it again. Ford would not let him do so and insisted that Motter sign the call verification form. Motter became very angry and told Ford that he did not want to verify any more phone calls placed to casuals.

On August 11, Manso was given a warning letter for coming to work four minutes late on the 5 a.m. shift. On August 17, Manso was again late to work on the 5 a.m. shift. On this occasion, he did not arrive until almost 6 a.m. According to Manso, he was driving to work along I-40

when his car overheated, so he had to pull over and park by the side of the highway. He found a phone booth near an abandoned filling station and phoned the terminal. There is no dispute that he phoned in about 5:25 a.m. to say he had trouble. Then, according to Manso, he phoned his wife, who drove quickly to the site of the phone booth in her car to pick him up. Manso then drove her car back onto I-40 and headed for the terminal with her, whereupon he was pulled over by Bernalillo County deputy sheriff Derryl Smith for speeding. Officer Smith issued only a warning and permitted Manso to proceed on his way.

When Manso arrived at work, he was closely questioned by supervisors concerning his story. When asked what time he left home, he became evasive and insisted that the answer to that question was irrelevant. The plant manager then drove to the spot on I-40 where Manso said he had parked his overheated vehicle and could find nothing. The Company pursued its investigation of this event by questioning Officer Smith and getting a statement from him. Based upon its investigation, the Respondent concluded that Manso was falsifying the reason for his tardiness so it discharged him for coming to work late on two different occasions. Manso grieved this discharge but lost at the first-step hearing and did not pursue his grievance any further. In testimony before the Board, Officer Smith did not corroborate Manso's story, testifying that, when he pulled Manso over on I-40 to issue a warning for excessive speed, there was no one with Manso in his vehicle.

C. Analysis and Conclusions

The establishment of a preferential casual list for dockworkers by Article 60 of the 1988 Western States Area Agreement threatened to bring about a small revolution in

the hiring practices at the Respondent's Albuquerque terminal. Before this time, the Respondent was able to keep down its costs and to assure maximum flexibility and minimum liability in its dock operation by supplementing its regular complement of employees with a pool of extra workers who could be hired and fired at will and who, if they wanted to remain on the Respondent's list, and to forego other employment opportunities and make themselves available for call without any obligation on the part of the Respondent to call them. Now the contract made casual employment on the dock a recognized first step on a career ladder and laid out well defined points along the way at which the Respondent must accord improved status to any dockworker who continues to make himself available for hire.

Respondent's witnesses to the contrary notwithstanding, it enjoyed the best of all possible worlds with the regular casual system and it was loath to abandon it. I flatly discredit the self-serving testimony of Hatfield, Herrington, Fultz, Johnson, and possibly others that the Respondent applauded the institution of the preferential casual system in the 1988 contract and regarded it as a boon to its operation. If the Respondent had regarded preferential listing of casual dockworkers as enthusiastically as its testimony would have the Board believe, the Respondent could have unilaterally instituted this system without seeking the approval of anyone many years ago and enjoyed the many benefits it says the system now has brought about. However, Respondent did nothing of the sort until it was forced to do so, not merely by contract but also by a National Grievance Committee award forcing it to comply with the plain language of that contract. Even so, and at this late date some two years following the adoption of Article 60 not one casual dockworker at the Albuquerque terminal has made it from the preferential list to the regular dockworker seniority list,

despite the fact that at least three regular dockworkers in a work force of one hundred have resigned or retired during that same period. Respondent has been fighting a last ditch effort to avoid the implementation of the preferential list requirement of Article 60 of the Western States contract at its Albuquerque terminal and the positions taken by it in this case are simply a part of that effort.

Herrington explained to several casuals at the time of their termination in June or 1988 what the Company's feeling was concerning preferential listing and why it felt the way it did. I credit testimony that he said that the Respondent much preferred to keep on operating its dock the way it had been doing—using a list of regular seniority employees supplemented by a group of extras who had no standing under the contract even to file a grievance in the event of being shortchanged or otherwise mistreated. Herrington was quite emphatic in his opposition to preferential listing of casuals: the Company was not going to let the Union tell it whom it was going to hire and when it was going to hire anyone. When the Respondent was forced to implement the provisions of Article 60, it was willing to discharge several experienced dockworkers—men who admittedly had been doing a good job and who were working full work weeks in casual status—rather than forego its traditional way of manning the facility. The only alternatives presented to all casuals were to waive their contractual rights or be discharged. This was told to them a second time by Herrington and Hatfield a few days later, just before the Arizona-New Mexico Joint States Grievance Committee began to hear their case at the first step. Some casuals accepted the Respondent's terms, signed waivers, and were put back to work. Six did not and were out of work for nearly a year until the National Grievance Committee directed the Respondent to put them back to work.

Even at that point, the Respondent did not relinquish its effort to avoid the full impact of Article 60. Without bothering to notify the Union or to bargain with it, the Respondent instituted toward preferential casuals a practice or policy that was at a variance with, and more stringent than, the practice it had been following with respect to other dockworkers. So-called "fifteen percenters" were and are called twice, and only on the second call is any effort made to verify the call for purpose of imposing discipline for not protecting one's shift. If there are enough casuals available, a fifteen percenter can pass a call. Regular casuals are not called in any stated order and no effort is ever made to verify calls placed to them. However, preferential casuals are called only once and those calls are verified so that discipline may easily ensue if no one answers the phone.

In the matter of lateness, the record is full of instances in which the Respondent either overlooked tardiness on the part of regular dockworkers or accorded it minimal importance while applying a more stringent standard of punctuality to preferential casuals. Indeed, in the Respondent's effort to show lack of disparate treatment to Manso, the instances of similar stringent treatment for attendance-related infractions upon which it relied upon were limited to conduct on the part of other preferential casuals. Respondent admits that its attendance standards are more lenient for other classes of employees. When asked why the difference, the Respondent conceded that, in terms of the functioning of the dock operation, a preferential casual who comes late to work poses no bigger problem that a regular who is late. The best the Respondent could devise as an explanation for such differential treatment was that preferential casuals were a new category or classifiction of dockworker and this was simply how they decided to handle them. The lack of any credible explanation based upon business necessity for dis-

parity of treatment of a whole class demonstrates that, even now, the Respondent is attempting to harass preferential casuals so that it will be easier to discharge them before they become regular seniority employees, and to persuade regular casuals that they are better off by waiving their right to be processed for preferential status and remaining in regular casual status.

In pursuing its effort to avoid complying with Article 60 of the Western States Area contract, the Respondent resorted to several fanciful arguments based upon its contract with the Union, thus laying the blame for actions it assertedly did not wish to take upon provisions of an agreement by which it was bound and upon the Union which wanted to hold it to the provisions of that contract. According to the Respondent, the implementation of Article 60 meant that it would have to place unqualified preferentials on their regular dockworker seniority list each time a vacancy occurred. There is nothing in the contract which even remotely suggests such a possibility. The contract states, in pertinent part:

> If the casual employee does not meet the Employer's hiring standards and qualifications . . . *while on the preferential hiring* list, the casual and the Local Union shall be so notified in writing and his/her use will be discontinued. (emphasis supplied)

It is abundantly clear that a determination of qualifications for permanent retention should, under the contract, be made while the casual is on the preferential list, not before he is placed there. The award made by National Grievance Committee applied the contract in just that manner and this is how the parties are now required to apply it. To say that moving a dockworker from the regular casual list to the

preferred list automatically entitles him by contract to a place on the regular list, regardless of qualifications, in the event of an opening is so wholly bereft of substance that it is not even arguable.

After the first-step grievance committee became deadlocked, the Respondent advanced a fall-back position. It offered to place casuals on a preferential list if the Union would agree that it had no obligation to train them until an opening should occur on the regular seniority list. The Union wanted all dockworkers trained to operate tractor-trailers whenever they were placed on the preferential list. The contract is silent on this precise point. The practice requested by the Respondent was enjoined upon the parties by the National Grievance Committee award. However, the Respondent was free to implement this practice immediately under the terms of the contract, with or without Union consent. Its proffered excuse for refusing to do so, namely that it feared that the Union would file a grievance if it went ahead unilaterally and did what it had offered to do, is frivolous. The Union had already filed a grievance that involved this question and the award arising out of that grievance resolved it.

Respondent's reason for not training all dockworkers as soon as they are placed on the preferred list also lacks substance and business justification. According to the Respondent, it costs about $1,500 to give a dockworker driver training. The Respondent voiced the fear that, if all preferential dockworkers were given this training, they might quit and go to work for other companies. The same possibility exists with respect to any qualified regular dockworker, most of whom are driver qualified. Moreover, a cadre of driver-trained preferential dockworkers would mean that both they and regular dockworkers would be available for whatever occasional driving chores might arise, rather than

leaving these functions exclusively to the regulars.[9] Here again, the Respondent was raising pretextual excuses for not creating a preferential list of dockworkers by attempting to use the contract as a basis for doing what it really did not want to do under any circumstances.

In *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, the Supreme Court gave its approval to the Board's *Interboro* doctrine[10] which, in general terms, states that it is a Section 7 right for an employee to assert rights conferred upon him and his fellow employees through a collective bargaining agreement. In pertinent part, the Court stated:

> Moreover, by applying Section 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also the entire process envisioned by Congress as the means by which to achieve industrial peace.
>
> To be sure, the principal tool by which an employee invokes the rights granted him in a collective-bargaining agreement is the processing of a grievance

[9]Herrington told several casuals just before they were discharged that he was not going to the expense of training twelve dockworkers to drive tractor-trailers because he did not need so many drivers. If true, his statement meant that the Respondent was advancing, as a justification for its position under the contract, a requirement for driver qualification of dockworkers when it really did not need drivers at all.

[10]*Interboro Contractors, Inc.*, 157 NLRB 1295, enf. 388 F.2d 495 (2nd Cir., 1967).

> according to whatever procedures his collective-bargaining agreement establishes. No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of Section 7. [citations omitted]. Indeed, it would make little sense for Section 7 to cover an employee's conduct while negotiating a collective-bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement.
>
> * * *
>
> No one would suggest, for instance, that the filing of a grievance is concerted only if the grievance turns out to be meritorious. As long as the grievance is based on an honest and reasonable belief that a right had been violated, its filing is a concerted activity because it is an integral part of the process by which the collective-bargaining agreement is enforced. The same is true of other methods by which an employee enforces the agreement. . . . *Supra*, at pages 835, 836, 840, 841.

The protected concerted activity of the six discriminatees named in the complaints in this case does not consist of overt actions, such as complaining to a Union official about safety violations and the failure of an employer to pay employees the contract rate for their services, or the refusal of an employee to drive an unsafe vehicle. Rather, their concerted protected activity was a refusal to sign waivers of their contract rights and the insistence, implicit in such a refusal, that those contract rights be accorded to them.

Herrington told all of the casual dockworkers on or about June 20, 1988, that they were being discharged because they had not signed waivers of their contract right to be processed for inclusion on the preferential list. His statements violated Section 8(a)(1) of the Act. As the direct and immediate result of their refusal to execute contract waivers, the dockworkers were discharged. Such discharges violate Section 8(a)(3) of the Act. *Pennsylvania Electric Company,* 289 NLRB No. 136. Respondent's subsequent refusal to reinstate any casuals until they did sign contract waivers is a follow-up violation of Section 8(a)(3) of the Act. The defense proffered for such discharges was, as outlined above, pretextual. The contract in question did not even arguably provide the Respondent with any warrant for doing what it did, and the grievance award, which was issued following those discharges, simply emphasized that fact.

The statements made to Manso upon his return to work by supervisors McNutt, Lovato, and Beeson amounted to threats that the Respondent would seek further retaliation against Manso because he had filed a grievance and also because he had filed an unfair labor practice charge.[11] Such threats violate Section 8(a)(1) of the Act.

[11]The Respondent has advanced the argument that it should not be charged with any unlawful activity in the summer of 1989 arising out of the action of Manso and Trujillo in filing an unfair labor practice charge against the Respondent on November 21, 1988. It is the Respondent's position that its lower ranking supervisors in Albuquerque were unaware that the charge had been filed and so could not be motivated in their actions by the fact that the charge had been docketed. The record reflects that the original charge in Case No. 28—CA—9500, as well as an amended charge filed a few days later, were served upon the Respondent during the month of November, 1988, at its Albuquerque terminal. Accordingly, the Respondent and all of its agents are deemed to have knowledge that the unfair labor practice charge and the amendment thereto were in fact filed by Manso and Trujillo.

The Complaint in Case No. 28—CA—9916 alleges that the Respondent unlawfully discharged Manso on June 19, 1989, because he filed a charge under the Act and because he filed a grievance. As noted, *supra,* the filing of a grievance is a Section 7 right; the filing of an unfair labor practice charge is protected by Section 8(a)(4) of the Act. Manso was a party not only to a grievance that had been filed against the Respondent; he was a party to a successful grievance that forced the Respondent to comply with a provision of the contract with which it was extremely reluctant to abide.[12] Upon his return to work, Manso was told that the Respondent was laying for him. Within six weeks, he was discharged.

The event that triggered the discharge was his asserted failure to respond to a call to work made at the request of Supervisor Ronald Ford by Teamster Jeff Motter. The call in question was made pursuant to a verification procedure that, as noted above, applied solely to preferential casuals, was more stringent than the call procedure used for other non-shift employees, and a procedure for which the Respondent could advance no business justification. In making the call, Motter was afraid that he had misdialed Manso's phone number, told Ford about the suspected error, and asked to dial again. Ford refused his request and directed Motter to sign a verification form attesting to the fact that Motter had dialed Manso's phone number and that there had been no

[12]The Respondent maintained throughout this proceeding that it actually won the grievance which was filed against it relating to the creation of a list of preferential casuals. Any party to litigation is entitled to put whatever spin it wishes on the outcome of a proceeding. However, the National Grievance Committee nullified the waivers which the Respondent insisted upon exacting from casual dockworkers as the price of their continued employment and ordered that six dockworkers who had refused to execute such waivers be reinstated. This is not the stuff of which notable victories are made.

reply. The Respondent could not justify the discharge that followed from this event to the Arizona-New Mexico Joint State Committee so Manso was reinstated without pay.

It is apparent from these facts that the Respondent harbored animus against Manso for engaging in protected activities and that there was no solid factual basis for its conclusion that Manso did not respond to a call to work on June 19. When Motter noted a suspected dialing error, the Respondent could have easily clarified the question by permitting Motter to dial again. It did not do so, thus evidencing a motive directed not toward filling out its complement of employees for the morning shift but of arming itself with a justification for discharging an unwanted employee. When it discharged Manso on June 19, the Respondent violated Sections 8(a)(1), (3), and (4) of the Act.

On August 17, Manso was admittedly late to work. His reason for tardiness was that his car had overheated on the interstate highway and he had to seek other means of transportation. Fultz admitted in his testimony that, if the Respondent had believed this story, Manso would not have been discharged. However, it suspected that Manso had really overslept and was falsifying an excuse, so it discharged him because it felt that there had been an element of dishonesty in Manso's entire course of conduct in this matter. I am compelled to agree with the Respondent. Manso said that he had parked his overheated vehicle along the side of the road at a stated location on I-40. The plant manager went out to search for the vehicle at this point shortly after Manso made this statement. He found nothing. Manso told the Respondent and testified at the hearing that he had been picked up by his wife in another vehicle and was driving to work when he was stopped for speeding by a deputy sheriff. The officer in question failed to corroborate an essential detail of Manso's story. In testifying in this proceeding,

Officer Smith stated categorically that there was no one in the car with Manso when he stopped to give Manso a warning for excessive speed. Smith was a credible and neutral witness, and I have no reason not to accept his testimony at face value. Accordingly, I must conclude that Manso was lying to the Respondent when he reported that his car had overheated and that he was late for work because of car trouble. In light of this conclusion, I must further find that the Respondent discharged Michael Manso on August 17 for cause and that so much of the complaints which allege that he was discharged on that date in reprisal for concerted protected activities and for filing a charge under the Act must be dismissed.

The Respondent asserts that the Board should defer to the grievance procedure in the contract respecting the issue of the 1988 grievance addressing the discharge of dockworkers for refusing to sign contractual waivers. It recognizes that deferral has been deemed by the Board to be inappropriate for discharges or other disciplinary action alleged to have been taken in violation of Section 8(a)(4) of the Act,[13] so it concedes that a determination on the merits should be made concerning the 1989 disciplinary actions taken against Manso. Respondent's request for deferral to the first grievance determination must necessarily be directed to the final award of April 6, 1989, since the intermediate actions of the Joint State and Western Area boards in that case were deadlocks which did not decide anything and did not result in an award. *Rosicrucian Press, Ltd.*, 264 NLRB 1323.

---

[13]See, for example, *Filmation Associates*, 227 NLRB 1721; *International Harvester Co.*, 271 NLRB 647; *Art Steel of California, Inc.*, 256 NLRB 816; with respect to deferring to grievance machinery for charges involving harassment for filing a grievance, see *United States Postal Service*, 290 NLRB No. 20.

The National Grievance Committee did not purport to hear or decide an unfair labor practice case. In fact it paid only perfunctory attention to the contract in question. Its resolution of the dispute between Local 492 and ABF amounted to knocking heads together and issuing directives to two contentious parties. While this may be an effective and common sense way of achieving industrial peace, it does not constitute an arbitral award which meets the standards for deferral.

It should be observed that, in the usual case in which deferral is in question, a disappointed grievant has gone to arbitration, has been turned down, and later seeks from the Board the relief he was denied under the grievance machinery by alleging the existence of an unfair labor practice. In such instances, the Board may be called upon to construe a contract in a manner inconsistent with the contract interpretation rendered by an arbitrator whose principal function is to interpret the meaning of disputed contract clauses. In this instance, the result reached by the National Grievance Committee is consistent with, and indeed supports, the finding of an unfair labor practice, since its award negated the validity of the Respondent's defense to the unfair labor practice allegations in the complaints, namely that the contract required the Respondent to discharge all unqualified casuals who had refused to execute waivers. The only aspect of the grievance resolution which was inconsistent with normal Board practice was the failure of the Committee to award backpay to the grievants.

The April 6, 1989, award by the National Grievance Committee made no findings of fact or conclusions of law. It dealt exclusively with results. It made no mention of the elements of the unfair labor practice issues which were litigated in this proceeding nor did the testimony presented to the Western Area Committee on which the National

Committee relied address any unfair labor practice. Accordingly, the Board should not defer to the award in question. *American Freight Systems, Inc.*, 264 NLRB 126; *Cotter and Company*, 276 NLRB 714; *Ryder/P. I. E. Nationwide, Inc.*, 278 NLRB No. 713; *M & G Convoy, Inc.*, 287 NLRB No. 110; *Dick Gidron Cadillac, Inc.*, 287 NLRB No. 105.[14]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record herein considered as a whole, I make the following:

II. Conclusions of Law

1. ABF Freight System, Inc., is an employer engaged in commerce within the meaning of Sections 2(2), 2(6), and 2(7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, and its Local 492, and each of them, are labor organizations within the meaning of Section 2(5) of the Act.

3. By discharging Michael Manso, Andy Trujillo, Jerry Miera, Arnold Haynes, Al Miranda, and Chad Sullins because they insisted that the Respondent comply with the provisions of a collective bargaining agreement governing the terms and conditions of their employment, by refusing to reinstate these employees for the same reason, and by discharging Michael Manso because he filed a grievance

[14]The Respondent also argues that somehow the charges filed in this case were time barred by Section 10(b) of the Act. The original charge was filed on November 21, 1988. The discharges litigated in the complaint arising out of the refusal of certain dockworkers to execute waivers of their contractual rights took place on or about June 20, 1988. The charge was filed well within the six-month period allowed by the Act.

against the Respondent, the Respondent herein violated Section 8(a)(3) of the Act.

4. By discharging Michael Manso because he filed charges under the Act, the Respondent violated Section 8(a)(4) of the Act.

5. By the acts and conduct set forth above in Conclusions of Law Numbers 3 and 4; by threatening employees with discharge because they filed charges under the Act and because they have filed grievances under the provisions of a collective bargaining agreement; and by threatening employees with discharge because they have insisted on the observance of rights guaranteed to them by contract, the Respondent herein violated Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Sections 2(6) and 2(7) of the Act.

III. Remedy

Having found that the Respondent herein has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. The recommended order will state that Respondent be required to offer full and immediate reinstatement to Andy Trujillo, Jerry Miera, Arnold Haynes, Al Miranda, and Chad Sullins, and that it make them and Michael Manso whole for any loss of earnings which they may have sustained by reason of the discriminations practiced against them, in accordance with the *Woolworth* formula,[15] with interest at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income tax. *New Horizons for the Retarded, Inc.*, 283 NLRB 1173. The fact that the National Grievance Committee failed to award backpay for the contract violation which it impliedly found had been committed by the Respondent is immaterial to a remedy which is appropriate in this case. As the General Counsel pointed out in his brief, backpay orders as remedies for violations of the Act have been a part of Board practice since its inception and there is no reason to depart from that practice in this case. To refrain from doing so because the National Grievance Committee refrained from doing so would be to defer to a portion of that award, an action which would be inappropriate for reasons already stated. See *Consolidated Freightways*, 290 NLRB No. 85. I will also recommend that the Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

On the basis of the foregoing findings of fact and conclusions of law, and upon the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following recomended:[16]

---

[15] *F.W. Woolworth Co.*, 90 NLRB 289.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent ABF Freight System, Inc., and its officers, agents, supervisors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge because they have filed charges under the Act or because they have filed grievances under the provisions of a collective bargaining agreement.

(b) Threatening employees with discharge because they have insisted upon the observance of rights guaranteed to them by the provisions of a collective bargaining agreement.

(c) Discharging employees because they have filed charges under the Act.

(d) Discouraging membership in or activities on behalf of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, its Local 492, or any other labor organization by discharging or refusing to reinstate employees, or otherwise discriminating against them in their hire or tenure.

(e) By any like or related means, interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions designed to effectuate the purposes and policies of the Act:

(a) Offer to Andy Trujillo, Jerry Miera, Arnold Haynes, Al Miranda, and Chad Sullins full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights previously enjoyed, and make them and Michael Manso whole for any loss of pay or benefits suffered by them by reason of the discriminations found herein, in the manner described above in the section entitled "Remedy."

(b) Preserve and, upon request, make available to the Board and its agents for examination and copying all payroll and other records necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Post at the Respondent's Albuquerque, New Mexico, terminal copies of the attached notice, marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by a representative of the Respondent, shall be posted immediately upon receipt thereof and shall be maintained by the Respondent for sixty consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily placed. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered over by any other material.

(d) Notify the Regional Director for Region 28, in writing, within twenty days from the date of receipt of this

[17]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Order what steps the Respondent has taken to comply herewith.

INSOFAR as the complaints herein allege matters which have not been found to be violations of the Act, the said complaints are hereby dismissed.

Dated, Washington, D. C. March 21, 1990

WALTER H. MALONEY
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

ABF FREIGHT SYSTEM, INC., IS POSTING THIS NOTICE TO COMPLY WITH AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD WHICH WAS ISSUED AFTER A HEARING IN A CASE IN WHICH WE WERE FOUND TO HAVE VIOLATED CERTAIN PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT.

WE WILL NOT threaten employees with discharge because they have filed charges under the National Labor Relations Act or because they have filed grievances under the provisions of a collective bargaining agreement.

WE WILL NOT threaten employees with discharge because they have insisted upon observance of rights guaranteed to them by the provisions of a collective bargaining agreement.

WE WILL NOT discharge employees because they have filed charges under the National Labor Relations Act or because they have filed grievances under the provisions of a collective bargaining agreement.

WE WILL NOT discharge or refuse to reinstate employees because they have insisted upon the observance of rights guaranteed to them by the provisions of a collective bargaining agreement.

WE WILL NOT, by any like or related means, interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL offer full and immediate reinstatement to ANDY TRUJILLO, JERRY MIERA, ARNOLD HAYNES, AL MIRANDA, and CHAD SULLINS to their former or substantially equivalent employment, and WE WILL make them and MICHAEL MANSO whole for any loss of pay which they have suffered by reason of the discriminations practiced against them, with interest.

ABF FREIGHT SYSTEM, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 234 North Central Avenue—Suite 440, Phoenix, Arizona 85004-2212, Telephone (602) 261-3188.

APPENDIX C—Statutory Provisions.

29 USCS § 152

§ 152. Definitions

When used in this Act [29 USCS §§ 151–158, 159–168]—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 USCS §§ 151–163, 181–188], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 USCS §§ 151–163, 181–188], as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State,

Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8 [29 USCS § 158].

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing,

29 USCS § 158

§ 158. Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [29 USCS § 156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [29 USCS § 159(a)], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [29 USCS § 159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 USCS § 159(a)].

29 USCS § 160

§ 160. Prevention of unfair labor practices

(a) Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [29 USCS § 158]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [29 USCS §§ 151–158, 159–169] or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable. Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States [28 USCS Appx] under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of

the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C) [28 USCS § 2072].

(c) Reduction of testimony to writing; findings and orders of Board. The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [29 USCS §§ 151–158, 159–169]: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [29 USCS § 158(a)(1), or (2)], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners [administrative law judge or judges] thereof, such member, or such examiner or examiners [judge or judges], as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court. Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such

manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment. The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court. Any person aggrieved by a final order of the Board granting or denying in whole or in

part the relief sought may obtain a review of such order in any court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order. The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

29 USCS § 173

§ 173. Functions of the Service

(a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act [29 USCS §§ 141–144, 151–158, 159–167, 171–183, 185–187, 191–197, 557].

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

(June 23, 1947, c. 120, Title II, § 203, 61 Stat. 153.)